First Quarter

KENTUCKY

PENAL CODE – KRS 508 – ASSAULT

Taylor v. Com., 2015 WL 1318885 (Ky. App. 2015)

FACTS: On April 20, 2011, the Taylors (Billy and Sarah) were at the Mullins home. Mullins and Billy Taylor were drinking. When the Taylors returned home, Billy fell asleep. When he awakened about 10:15 p.m., he found Sarah and their car missing, so he went to look for her on foot. Sarah later stated that as she was returning home, having gone to buy cigarettes, she found Billy walking down the road. He got inside and they began to argue – he then "pulled her out of the car" and hit her. They got back into the car and drove to the house, where Billy then shattered the windshield with a rubber mallet. He closed the door on her leg and struck her repeatedly with the mallet as well. She got into the house and hid until police arrived.

Billy stated that Sarah had told him she was having an affair with Mullins, and he admitted striking her with his hands, but not the mallet. He hid when police arrived, but was found – Billy then fled into the woods. A K-9 found him and he was arrested.

Taylor was charged with Assault 2d. He was convicted and appealed.

ISSUE: When a serious injury is involved, may hands and feet be considered dangerous instruments?

HOLDING: Yes

DISCUSSION: Taylor argued that the jury instructions were incorrect, and that the "statutory definition of a dangerous instrument states a part of the human body – in this case Taylor's fists – can only be a dangerous instrument when it causes **serious physical injury**."[1] The Court looked to the statute, KRS 508.020(b) which provides for the charge if a person "intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument." Under the Penal Code definitions, however, a dangerous instrument is "any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body …" There was no evidence showing that Sarah's injury were serious.

The Court agreed that the term "serious physical injury" was improperly omitted from the instructions and that when the injury is caused by a part of the body, serious physical injury is required. As such, it agreed reversal was necessary. However, it disagreed with Taylor's contention that he could not be retried due to double jeopardy, as the Court agreed that it could be retried to determine if the jury agreed he'd struck Sarah with the mallet, which would only require physical injury be proven.

[1] Emphasis in original.

The Court agreed that evidence of an assault between the two that took place the month before, also connected to Taylor's concerns about Mullins, was properly admitted as it was "contextually significant." However, the Court admonished the trial court to use care in introducing the evidence in a subsequent trial. The Court also agreed that he was properly denied a voluntary intoxication instruction as there was no evidence that he was anything other than clearly aware of his actions.

Finally, the Court agreed that the deputy's testimony as to what Sarah said when he initially arrived was hearsay, but that since she was available to be questioned about it, and because her statements could have been considered, arguably, excited utterances, the deputy's testimony was proper. (The Court noted that Sarah was "clearly stressed and excited from the incident as she was panicked and sobbing uncontrollably.") The amount of time was unclear, and if it occurred within a few minutes, as was put forth by the prosecution, "then the incident would have been fresh and Sarah still under its immediate stress, with little opportunity to fabricate." The Court agreed that "if the facts align with the excited utterance factors outlined by our courts," then the statements would qualify as excited utterances.

The Court reversed the conviction because of the instruction issue.

PENAL CODE – KRS 514 - THEFT

Ray v. Com., 2015 WL 730035 (Ky. 2015)

FACTS: On July 2, 2013, Edwards, a Walmart employee in Muhlenberg County, spotted Ray walking towards the exit with a cart loaded with two air conditioners. He made eye contact, immediately turned and headed back into the store. Edwards contacted Beadnall, the asset protection manager, who arrived quickly and was briefed. Edwards identified Ray, and Beadnall kept him in sight in the store. Again he headed to an exit, passing up the cash registers. He pushed the cart into a set of automatic entry doors, which triggered an emergency mechanism. She approached and spoke to him, but was ignored, with Ray making "a sound." He backed the cart out and went back into the store, with Beadnall still following. He finally abandoned the cart and left the store, with Beadnall following. She contacted the police who located and arrested Ray.

Ray was indicated for theft. He was convicted and appealed.

ISSUE: Must an item be actually removed from a store to be considered stolen?

HOLDING: No

DISCUSSION: Ray argued that since he did not leave the store with the items, there was no "taking" sufficient for Theft. The Court looked to KRS 514.030(1)(a) and agreed that "actually taking an item is not required for there to be a completed theft by unlawful taking." Instead, what is necessarily is an unlawful exercise of control, with the intent to deprive another of the item. The crime is complete either way.[2]

[2] Com. v. Day, 599 S.W.2d 166 (Ky. 1980).

The Court also agreed that it was proper for the prosecution to enter evidence of two thefts that had occurred the week before, in Ohio County, for which he'd just been convicted. The Court agreed it was "probative, relevant, and not unduly prejudicial."

Ray's conviction was affirmed.

Merritt v. Com., 2015 WL 226048 (Ky. App. 2015)

FACTS: On September 13, 2010, Cain (age 85) was at home in Madison County when a man approached him, offering to blacktop his driveway. After discussing it with his wife, Cain agreed, believing that the price would be $27. Five or six men, including Merritt, worked on the driveway for several hours. He realized they'd started working on a second driveway. Intended to tell them to stop, he went out, but fell and was injured. When his wife returned, they were still working. When finished, two men, including Merritt, came to the door and told them the bill was $20,000, but no invoice or bill was provided. He called his bank, which told him the money couldn't be had until the next day. They next day, Mrs. Cain met Merritt at the bank and gave him a check, which he immediately cashed.

The bank branch manager, concerned, contacted Det. Wagner (Berea PD). He interviewed the Cains, who could not give names or descriptions for the men. He did a recorded interview with Merritt; he claimed that he was a "work hand" and was paid only $100. He indicated that Grady owned all the equipment and made all the arrangements, he simply cashed the checks because he was a Kentucky resident with a Kentucky OL. He claimed to have given the money to Grady.

Merritt was indicted for theft by deception over $10,000. A witness testified that the driveway should have cost between $2,000 and $3,000 to blacktop and that the work done was substandard. He also said that any check should have been made out to a business. Merritt was convicted and appealed.

ISSUE: Is passing a check for money obtained as a result of a deception unlawful?

HOLDING: Yes

DISCUSSION: Merritt argued there was no evidence he was involved in the negotiation of the job or the price, and as such, the charge was improper. The Court noted that Merritt was present when Cain was quoted a price and that he was directly involving in the cashing of the check. As such, the Court agreed he obtained money "by reinforcing a false impression of the value of the work performed." It was also proper for him to be assessed the total restitution, as joint and several liability, nor should it be reduced by the value of the substandard driveway.

Merritt's conviction was affirmed.

PENAL CODE – KRS 515 – ROBBERY

Watkins v. Com., 2015 WL 136175 (Ky. App. 2015)

FACTS: On March 28, 2007, the Hopkinsville Dollar General was robbed at gunpoint. The employees immediately called police. Police found a gun lying on a shelf in the store, it turned out to be a compressed carbon dioxide BB gun. In canvassing the area, they located Watkins and discovered he had the bag of money. They found gray sweatpants, as described as being worn by the robber, nearby, with a key to Watkins' home in the pocket.

Watkins was convicted of Robbery 1st and appealed.

ISSUE: Is a BB gun a deadly weapon?

HOLDING: Yes

DISCUSSION: Among other issues, Watkins claimed that he was not armed with a deadly weapon and the Court agreed that a "victim's perception of a toy or other object is insufficient" to prove that.[3] However, at the time of the crime, a victim's "mere perception" was enough. Further, the Court noted, a BB gun has been held to be a deadly weapon.[4]

Further, he objected to photos of the pants and the key were improperly admitted, but the court agreed that although circumstantial, it was valid evidence. The officer who found the sweatpants was not available to testify, so he questioned the chain of custody. The Court noted, though, that an items that is "clearly identifiable and distinguishable [does] not require proof of a chain of custody" to be admitted.[5] Several officers were able to testify to the items, which were "readily identifiable." As such, they were properly admitted.

PENAL CODE – KRS 527 – FIREARMS

Flores v. Com., 2015 WL 1303623 (Ky. App. 2015)

FACTS: On July 21, 2013, in Graves County, Flores and Munoz (boyfriends for 9 years) got into an argument; Flores left. He returned later that night and knocked, but Muoxz would not let him in. Munoz saw Flores walking around to the back of the house, alone. He then heard three gunshots. After a few minutes Munoz went outside and saw Flores sitting in a chair, with a handgun next to him on the table. Munoz picked up the gun and hid it inside.

Officer Hampton arrived, in response to the gunshots, and found Flores sitting in the chair, as well as ten spent .40 shell casings, about 20 feet away. Flores denied knowing about the shots, and initially, so did Munoz. When pressed, he admitted Flores had fired the gun. He showed them the weapon, which matched the caliber of the empty shell casings.

---

[3] Wilburn v. Com., 312 S.W.3d 321 (Ky. 2010).
[4] Johnson v. Com., 327 S.W.3d 501 (Ky. 2010).
[5] Rabovsky v. Com., 973 S.W.2d 6 (Ky. 1998).

Flores was arrested and searched, and additional cartridges were found in his pocket, in a sock. They were of a different make than the spent casings, but the correct caliber for the weapon. He finally admitted to having fired the weapon.

Flores, being a convicted felon, was charged with possession of the weapon, as well as wanton endangerment and terroristic threatening. He was convicted and appealed.

ISSUE: Is the ability to exercise dominion and control over a firearm enough for a constructive possession charge?

HOLDING: Yes

DISCUSSION: Flores argued that he had been entitled to a directed verdict, in his favor, on the weapons charge. The Court acknowledged that constructive possession was sufficient to prove the charge, under KRS 527.040. The evidence presented indicated that he had the "ability to exercise dominion and control over" the firearm, was enough. Flores' conviction was affirmed.

DOMESTIC / FAMILY

Sitar v. Sisco, 2015 WL 509635 (Ky. App. 2015)

FACTS: On March 21, 2014, Sisco requested an EPO/DVO in Crittenden County, alleging that Sitar, who had served time for raping and assaulting her in the past was now visiting houses in the same block as her home. (She detailed how close he lived and how he'd already asked whether there was a no-contact order.) The EPO was issued. At the subsequent hearing, she described how he was her mother's former boyfriend and the sexual abuse that had occurred – however he had apparently pled guilty only to wanton endangerment. Sisco complained that Sitar was spending time at the home where his children lived, with their mother, and that was within 50 feet of her own home. (His children were living in the neighborhood first, and then Sisco's mother moved in, and subsequently Sisco took over that trailer.) He had been made to move by a prior order and now lived in another part of the county.

Although she agreed he'd never actually threatened her, since his release, but stated that she was terrified of him looking at her and walking near her. She requested the EPO because she wanted to attend a birthday party for his daughter, whom she knew, and didn't want to be bothered by his attendance at the party. Sitar denied all of the above allegations and argued that there wasn't a sufficient relationship to order the DVO.

The Court noted that "this should have been dealt with as a criminal matter," and stated that it "could see that for a victim of sexual abuse, confronting the perpetrator would inflict imminent fear of future abuse or sexual abuse." The Court issued a short-term, 3 month, DVO and explained that the "system was not designed to protect her from something that happened a long time ago."
Sitar appealed, although the DVO has since expired.

ISSUE: Is an EPO/DVO permitted for a relationship that does not fall under the statute?

HOLDING: No

DISCUSSION: Sitar argued that the mootness doctrine should not apply since this was a situation "capable of repetition but evading review." Since Sisco had "repeatedly filed for DVOs under the same set of facts and occurrences," the Court agreed that was the case. Sitar argued that the statute did not provide for an EPO/DVO for the relationship as stated and that in fact, Sisco didn't check any of the boxes on the form, but instead, wrote in a description of the relationship. The Court agreed that Sisco is currently "an adult who is capable of seeking protection from Sitar." The Court reluctantly agreed that the law did not provide for protection in this type of setting, since he is not her stepfather and they shared no statutory relationship at all.

The Court reversed the domestic violence order.

Bethel v. Aubrey, 2015 WL 394102 Ky. App. 2015

FACTS: Aubrey and Bethel dated and lived together for about a year. In June, 2013, Aubrey requested an EPO, detailing threats and actions Bethel had taken against her. It was issued. In December, 2013, she requested it be dismissed, and it was. Three weeks later, she requested another one, alleging a number of threatening text messages. Bethel testified that he did not wish to have any contact with her and that she only wanted the DVO so that "he could not contact her probation officer to report that she had been seen with a firearm and was on drugs." The Court issued the DVO and Bethel appealed.

ISSUE: May an earlier dismissed DVO support the need for a current DVO?

HOLDING: No

DISCUSSION: The Court noted the standard for issuing a DVO. Bethel had argued that the "trial court improperly relied on the previously dismissed DVO as evidence of domestic violence in the current case," and that appeared to be the case from the record. In that hearing, Bethel's attorney had been denied an opportunity to review the evidence the judge was considering, which by KRS 403.741 was required.

For that reason, the court agreed that the DVO was improperly entered and vacated it.

SEARCH & SEIZURE – EXPECTATION OF PRIVACY

Rhodes v. Com., 2015 WL 603263 Ky. App. 2015

FACTS: On August 24, 2011, Det. King (Louisville Metro PD) received a complaint about an individual selling cocaine from a specific address. They surveilled the property for an hour and then saw Rhodes let himself inside with a key. He stayed about 5-10 minutes. He then left, drove to another residence (some distance away) and returned to the first. There he was stopped and frisked. Rhodes was told what was going on and he explained that the home belonged to the mother of his son. He gave consent to search his vehicle – nothing was found. The property owner (Bradley) gave consent over the telephone for a search of the house.

Inside, they found a non-operational .22 Raven, with a pink grip, in the master bedroom closet and a .40 Highpoint with a trigger lock under the bed. Rhodes had told them there were weapons in the house. They also found a prescription pill bottle with Rhodes' name, but a different address. His key ring included a key to the house, a key to the trigger lock and a key to the car he was driving.

Rhodes, a convicted felon, was charged with possession of a handgun. At trial, friends testified (in a contradictory manner) about Rhodes' connection with the house and the weapon in question – the HiPoint. There was also conflicting information as to whether the key to the trigger lock was readily available in the house. He moved to suppress and was denied. He was convicted and appealed.

ISSUE: May evidence found in a home where someone does not legally reside still be used against them?

HOLDING: Yes

DISCUSSION: Rhodes complained that admitting evidence against him that was found in the search of the residence was improper, as there was evidence that he did not live there. Consent to search was obtained from the property owner. However, the evidence that Rhodes was connected to the weapon, in fact, said it was there before it was found. His friend testified that Rhodes was with him when he purchased the weapon and that the weapon was at the home. As such, the Court agreed there was sufficient reason to find him in possession of the weapon.

In addition, the Court agreed that the officers had sufficient reasonable suspicion to interact with him, initially, and that a mention by one of the detectives about information that had been ordered not to be shared at trial, which triggered a mistrial, was improper, but not done in bad faith so as to trigger double jeopardy.

SEARCH & SEIZURE – SWEEP

DeCoursey v. Com. , 2013 WL 4511937 (Ky. App. 2015)

FACTS: On January 22, 2011, Det. Berghammer and two Christian County deputy sheriffs went to serve arrest warrants on DeCoursey and Atwell. At the home, Det. Berghammer detected a strong chemical odor coming from the house, and security cameras outside. He knocked but no one entered. Two vehicles were present and a fan was running in the attic. He also saw "several plastic bottles with tubing coming out lying outside the residence" – he recognized them as "smoke bottles" for manufacturing methamphetamine.

As the detective was contacting the Commonwealth's Attorney, Ms. DeCoursey came to the door. As she opened it, he smelled ether and anhydrous ammonia. They secured her and swept the home, finding one person in the bathtub and the other in a closet. Numerous items associated with methamphetamine production were found in plain view. A search warrant was obtained for a further search.

DeCoursey was charged with a variety of offenses related to methamphetamine production. He moved to suppress, which was denied. He took a conditional guilty plea and appealed.

ISSUE: May exigent entry be based on odor?

HOLDING: Yes

DISCUSSION: DeCoursey argued there "were no exigent circumstances warranting the warrantless entry into his residence." The Court noted that he "did not conduct a full search of the apartment, but rather did a sweep of the residence and waited to search the entirety of the residence until after securing a warrant." It noted that an exception exists when "an officer reasonably believes that an immediate search or seizure is necessary in order to avoid 'risk of danger to police or others.'"[6] Probable cause and exigent circumstances ae required "for the exception to apply."[7] Further, Kentucky recognizes the "plain smell" rule, "whereby an officer may infer probable cause based on the smell of illegal substances."[8] Since the detective had years of experience and his suspicion was based both upon odor and what he observed, and because "an active methamphetamine lab presents a significant danger both tot eh public and the police because of the high risk of explosion and exposure to toxic fumes,"[9] the Court agreed he had probable cause for the entry and acted properly.

DeCoursey's plea was affirmed.

SEARCH & SEIZURE – VEHICLE STOP

Wade v. Com., 2015 WL 394113 (Ky. App. 2015)

FACTS: On September 19, 2012, Sgt. Rehkamp (Florence PD) spoke to a citizen who was concerned about a package delivered to a vacant home. The caller had spotted a vehicle sporting a Kentucky law enforcement memorial plate near that home. Sgt. Rehkamp contacted Det. Stanaland, who was also a member of the FBI Safe Streets Joint Task Force – about intercepting the package, presumed to contain drugs. It was collected and found to contain three 1-pound packages of marijuana, hidden inside a hollow computer tower. It was addressed to Brian Perry at that address. He removed most of the marijuana and returned it back to the porch of the home. Within a half-hour, an vehicle matching the description appeared, driven by Wade, who Officer Burch, also present, knew – it drove by the house. Det. Mitchell, Erlanger PD, took over for Officer Burch, and two hours later, it came by again, again driving by without stopping. A little later, another vehicle came by, driven by Brian Berry, stopped and picked up the package. Ray, Berry's girlfriend and the owner of the vehicle, was a passenger. Both were stopped and arrested.

Berry, was given Miranda and agreed to work with the officers. He stated he was just picking up the package and was to deliver it to a home the officers believed to be Wade's – although he did not know the exact address. He eventually confirmed he was taking it to Wade, a long-time friend. He agreed to continue with the delivery. The entirety of the marijuana was returned to the package and they followed Berry to Wade's home. Det. Stanaland observed from the front yard as a man came out and accepted the package, but he could not identify the man. A few minutes later, the same vehicle spotted earlier left the home. Det. Stanaland requested a marked unit make a traffic stop,

[6] Pate v. Com., 243 S.W.3d 327 (Ky. 2007).
[7] Kirk v. Louisiana, 536 U.S. 635 (2002).
[8] Cooper v. Com., 577 S.W.2d 34 (Ky. 1989).
[9] U.S. v. Atchley, 474 F.3d 840 (6th Cir. 2007).

and Deputy Demoisey (Boone County SO) responded. He knew the detective, was nearby and offered help. They shared information by radio and made the stop, finding Wade to be the driver. The deputy later testified that he made the stop based solely on what he was told by Det. Stanaland, and that he assumed "from the radio chatter" that drugs were involved. He remained in the vehicle until Sgt. Rehkamp arrived and summoned a K-9, as he stated he smelled marijuana. He was allowed to sit in Dep. Demoisey's cruiser but only after being patted down. He admitted having marijuana and that, plus cash, was found. Corp. Dolan (Florence PD) brought Max to the scene and he alerted on the trunk, then both car doors. Wade was able to observe the search. A number of items, including "several empty vacuum-packed bags that smelled strongly of marijuana" were found in the trunk.

Wade was charged and moved for suppression. The Court denied the suppression, finding that the deputy had at least reasonable suspicion for the stop. He was convicted and appealed.

ISSUE: Is it reasonable to stop a vehicle that has just left a drug buy location?

HOLDING: Yes

DISCUSSION: The Court reviewed all of the evidence as available to the officers and agreed that Det. Stanaland reasonably believed Wade, and his vehicle, were involved in the situation, and that the stop was lawful.

On another issue, the Court noted that Officer Burch made a comment that he'd known Wade "from a prior." That did not draw an immediate objection, and the Commonwealth told the Court it had told all of its witnesses "to say nothing about how they recognized Wade, but reserved their right to explain the basis of their knowledge" if it became necessary. The Court declined the mistrial requested and the defense declined an admonition. The Court agreed that Burch was "redirected" … "before he was able to reveal any objectionable information."

Wade's conviction was upheld.

SEARCH & SEIZURE – GANT

Saylor v. Com., 2015 WL 136547 (Ky. App. 2015)

FACTS: On June 14, 2015, Officer McQuire (Berea PD) made a traffic stop of Saylor. Saylor stepped out when requested; his eyes were "extremely bloodshot" and an "odor of alcohol was emanating either from Saylor or from his vehicle." He agreed to a pat-down (although a footnote suggested that he appeared to mean a frisk, he did not limit it.) "Officer McQuire demonstrated his pat-down technique on cross-examination below and testified that every time he asks someone to exit a vehicle he performs a pat-down for safety." During the course of it, he detected "narcotics packaging materials" in Saylor's pocket – he removed it and asked Saylor what it was. Saylor responded that it was methamphetamine. McGuire placed Saylor under arrest. He then had Knuckles, the passenger, get out and Knuckles also consented to a pat-down. A straw with residue was found and Knuckles admitted he "did pills" and that was the residue was said pills. He too was arrested for possession of drug paraphernalia.

Officer McGuire searched the car, finding items suggesting methamphetamine use. Saylor moved for suppression, which was partially granted with requested to what was found in his person. The Court agreed the admissions gave probable cause for a search of the car. Saylor took a conditional guilty plea and appealed.

ISSUE: Is it proper under Gant to search a vehicle in which the subjects have admitted drug possession?

HOLDING: Yes

DISCUSSION: The Court agreed that, under Arizona v. Gant, the officers had ample reason to believe that "evidence of illegal pills would be found inside Saylor's truck." The Court noted that "our law is clear that an officer may search a vehicle incident to arrest when a reasonable believe exists that evidence relevant to the crime of arrest may be found in the vehicle."[10] Saylor's plea was upheld.

SUSPECT ID

Northington v. Com., 2015 WL 1120319 (Ky. App. 2015)

FACTS: On April 17, 2010, Melton was beaten in the head with a tire iron at his workplace. Two years later, Northington was indicted for Assault in the First Degree, along with his ex-wife, Maxie. Maxie provided the critical information, with the motive being a business dispute with Melton over tires she'd purchased. During pretrial, the Commonwealth indicated that Maxie had made a deal that her charges would be dismissed in exchange for her testimony, and it was clear that it was intended that she would be the primary witness. However, she died prior to trial Also before the trial, Northington moved to deny any in-court identifications by three eye-witnesses, because they had never provided a description of the attacker or asked to view photo packs. Melton's description of his attacker was very general and he could not identify any photos due to his head injury which left him unconscious.

Further, he moved for dismissal, arguing that the Commonwealth failed to turn over potentially exculpatory evidence. Before trial, it was learned that the first detective (who retired) may have done a photo pack but it could not be found. The detective who turned over the case understood that the earlier detective had not shown any photo packs to Melton, and according to the victim, he showed him a photo pack in which he could not make any identifications. The Detective could not recall if he'd done one, however. Despite rulings at least partially in his favor, Northington took a conditional guilty plea and appealed.

ISSUE: Should an in-court identification by a witness, who previously did a pretrial identification, be assessed under Biggers?

HOLDING: Yes

[10] Arizona v. Gant, 556 U.S. 332 (2009).

DISCUSSION: To evaluate the admissibility of an in-court identification by a witness following an allegedly suggestive pretrial identification by the same witness," the Court looked to Biggers.[11] First, the Court had to look to whether that first identification was, in fact, "unduly suggestive," and if so, whether there is an "independent basis to support the reliability of the in-court identification" anyway. To do so, the Court could look to the Biggers factors: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the prior description of the criminal; 4) the level of uncertainty demonstrated by the confrontation; and 5) the time between the crime and the confrontation."[12]

In Grady, the Court noted, "when materials used for a pre-trial lineup are lost before the defendant has an opportunity to scrutinize their content,' the defendant is entitled to a rebuttable presumption that the materials show to the witness were 'unduly suggestive.'" In this case, the trial court did not conduct a hearing or issue any written rulings, it "simply presumed" that the material was not suggestive. The Court noted there was a "great deal of confusion" regarding the sequence of events, and the Court noted that an evidentiary hearing should have been held; it remanded the case for a "proper evidentiary hearing" on the issue.

With respect to the other three witnesses, the Court noted that the record was unclear on how they were connected to the assault, and specifically stated that it was clear that none of the witnesses "had given a prior description of the perpetrator or participated in any pretrial identification process. He argued that having them identify him for the first time in court was prejudicial because he would be "the only African-American male sitting at counsel's table."[13] The Court, however, looked to Russell v. Com. and noted that Russell provided for the trial court to make the assessment as to reliability.[14] The Court noted that unpublished case law in Kentucky "has not extended Biggers to in-court identifications." The Court found the court's decision in that matter to be at most, harmless error.

The Court vacated the identification by Melton and remanded the case for an evidentiary hearing on the issue, and affirmed the decision to allow the in-court identification of the three witnesses.

INTERROGATION

Bond v. Com., 453 S.W.3d 729 (Ky. 2015)

FACTS: In May, 2010, Shelby was living with Bond, temporarily, in Jefferson County, and sleeping on his couch. On May 11, at about 5:30 p.m., Shelby arrived and found Bond and his girlfriend, Hendricks, getting dressed. They had dinner and drank beer and liqueur – Hendricks passed out. The two men dragged her into the bedroom and covered her with a blanket, while she lay on the floor. At about 10 p.m., Bond went into the bedroom and Shelby went to sleep on the couch.

At about 1:45, Bond woke Shelby and told him he thought Hendricks was dead. Shelby found Hendricks, nude and turning blue, and also thought she was dead. He encouraged Bond to call 911,

[11] See also Grady v. Com., 325 S.W.3d 333 (Ky. 2010).
[12] See Savage v. Com., 920 S.W.2d 512 (Ky. 1995).
[13] Merriweather v. Com., 99 S.W. 3d 448 (Ky. 2003).
[14] 490 S.W.2d 726 (Ky. 1973).

and he finally did. EMS confirmed her death and contacted the deputy coroner, who finding the situation suspicious, called police.

Det. Wescott (Louisville Metro PD) arrived and interviewed the two men. She did not collect any evidence. The autopsy indicated that Hendricks had been strangled and subjected to anal sex before her death. Officers asked Bond if he would come to the station; he did so. Det. Lesher interviewed him at length, during which time he admitted to having had anal sex with her while unconscious. He did not think she had died then, however. He had been given Miranda and signed a waiver form. Bond later denied it, claiming the sex had occurred earlier in the day.

Bond was arrested for Murder and Sodomy 1st. Bond moved to suppress the statement he gave to Lesher, which was denied. At trial, portions of it were played, and Bond was further denied a motion to play the entire statement. Bond was convicted and appealed.

ISSUE: Does assuring a suspect that their statement was "just between" the suspect and the officer make it coerced?

HOLDING: No

DISCUSSION: Bond argued that Det. Lesher's style of interrogation was improper, in that he had assured Bond that the statement was just for the two of them. The Court noted that in the case bond cited, Leger v. Com.,[15] the Court had actually recognized that "artful deception is an invaluable and legitimate tool in the police officer's bag of clever investigative devices," while agreed that "deception about the rights protected by Miranda and the legal effects of giving up those rights is not one of those tools." In this case, the Court agreed that Lesher's style was proper and that statements he made about his own spouse's sexual preference (in an attempt to get Bond to discuss his own) was proper. Lesher never stated that the conversation was confidential in any way, although he explained the recorder he was using as being for his own use. (Even without being recorded, the statements could still be used.) Although somewhat concerned about Lesher's soft-pedaling of the Miranda rights, the Court could not say it vitiated those rights.

He also argued that at the time, he was told they were just getting additional information, and that he was "not in trouble," nor did they think any crime had occurred. Lesher later indicated that at the time, they didn't know what had happened, although they knew she'd been strangled. The Court agreed that asking Bond the same questions, "plying him" with questions, did not violate KRS 422.110, the anti-sweating statute. The Court found the conduct of the officers "within the bounds of acceptable and 'fairly standard' police practice." Rather than trying to elicit a desired answer, it was as a result of Bond's "changing version of events." There did not seem to be any undue pressure on him to produce a particular statement.

The Court agreed that while the excluded portions of the recording might have given the jury a "more complete description of his relationship to Hendricks," that it "did not alter the meaning of the included portions." The Court found it was not error not to admit the entire statement.

Bond also argued that the only evidence that he'd committed sodomy was his own statement that she was unconscious (physically helpless) at the time. The Court agreed that Bond was correct that

[15] 400 S.W.3d (Ky 2013).

under RCr 9.60, a confession could not be used as the sole evidence of a crime, without further corroboration, but in this case, the Court concluded there was sufficient additional evidence that the anal sex occurred when Hendricks could not have consented due to extreme intoxication – having a level between 0.31 and 0.38 at the time of her death.

The Court upheld Bond's conviction.

Sykes v. Com., 453 S.W.3d 722 (Ky. 2015)

FACTS: On May 10, 2010, at about 10:30 p.m., Sykes robbed the China Wok in Louisville. The couple who owned it were present and approximately $80 was taken. Sykes shot Lin, the male owner, several times, causing a severe injury. Underwood was a lookout, but never entered. Both were arrested several days later. Sykes was questioned by Det. Perry and Det. Middleton, after properly receiving and waiving Miranda. The Court noted that Det. Perry asked opened ended questions and allowed Sykes to full explain his answers and ultimately, he confessed. Although only 18, Sykes had several previous encounters with the justice system. The trial court had acknowledged that Sykes had "a host of psychological disorders, including Bipolar Schizophrenia," but that he appeared to have a "coherent grasp of his legal situation." Sykes was charged with Murder - Attempt, Assault 1st, Robbery 1st, Burglary 1st and possessing the handgun, as well as several related charges. He was convicted of everything except Assault and Burglary. He appealed.

ISSUE: Does the "Rule of Completeness" generally require that an entire statement be admitted?

HOLDING: Yes

DISCUSSION: The Court agreed that the interrogation was completely proper, although acknowledging some concern about a gap in the recording during which, it was agreed, Det. Middleton continued to speak to Sykes. Since Sykes did not argue any coercive action during that time, the Court agreed the confession was properly admitted.

Sykes further argued that it was error to admit an "improperly redacted confession to the jury." Under the Rule of Completeness, KRE 106, the Court agreed that the party against whom the partial recording is admitted has the right to require that the entire recording to be played, "in fairness." However, the Court is to look at "whether the meaning of the included portion is altered by the excluded portion."[16] It is intended to allow a statement to be put "in its proper context." The redactions were discussed in a hearing, initially, and further redactions were proposed just before it was to be played. Unfortunately, the statements that were not played, in which Sykes explained his admission that he'd fired the gun, the Court agreed, violated the rule of completeness, as the sentences were exculpatory – in that they suggested that he didn't intend to fire the gun. "The omitted portions of the confession with which Sykes takes issue speak directly to intent to kill, or rather, lack thereof."

Sykes conviction for Criminal Attempt to Commit Murder was reversed and the case remanded.

[16] Young. v. Com., 50 S.W.3d 148 (Ky. 2001); Com. v. Collins, 933 S.W.2d 811 (Ky. 1996).

TRIAL PROCEDURE / EVIDENCE – EXPERT WITNESSES

Smith v. Com. / Wilson v. Com. 454 S.W.3d 283 (Ky. 2015)

FACTS: On August 14, 2011, Smith and Wilson fired a "barrage of gunshots into a crowd of people gathered at Shawnee Park in Louisville." Anderson died and two others were seriously injured. Vehicles, including one in which Anderson's 4-year-old granddaughter was sleeping and pregnant fiancée was sitting, were also struck. Officer Johnson was present and witnessed Wilson standing and firing a handgun, along with "other muzzle flashes" nearby. Wilson, Smith and another man fled on foot, followed by the officer. Retracing the path, officers found four handguns, three clustered together. Several of the ejected casings and projectiles were linked to those guns.

Smith and Wilson were jointly tried, the other individual was a juvenile. Smith was convicted of Complicity to Murder, Criminal Attempt to Commit Murder and related charges. He appealed.

ISSUE: May a qualified officer testify as a witness on gangs (or other matters)?

HOLDING: Yes

DISCUSSION: Smith argued that it was improper to allow Det. Huffman to testify about the general nature of gangs and specifically, how they operate in Louisville. He identified Smith as being a member of a specific gang (Cecil N Greenwood – or CNG), by his clothing at the time, hand signs and a tattoo honoring a slain member of CNG. Two of the shooting victims were members of a rival gang, Victory Park and he opined that the shooting was retaliation.

The Court noted that Det. Huffman was well qualified to testify on gangs in the area and that his "knowledge and experience in this field are unquestioned." As such, he was properly permitted to testify as such after two Daubert hearings. Further, the evidence was clearly relevant in that it provided a "possible motive for what would otherwise appear to be an inexplicable massacre." [17]

Officer Johnson also provided detailed testimony and identified Wilson in the group. He also recognized Smith from the area. Some witnesses indicated that they were reluctant to speak to the police because of the fear of being labeled a snitch, and one indicated he may have been the "true target" because of his own connections. The Court noted that the testimony was carefully crafted so as to be "neither inflammatory or excessive."

The Court upheld Smith's conviction.

With respect to Wilson, he argued that he should have been given a jury instruction on self-protection and that when he was observed shooting, it was only after another individual had fired at him. Testimony indicated at least six handguns had been fired although only the four were recovered. However, Wilson did not present a self-defense argument at trial, instead, he argued he wasn't there and did not have a gun, which contradicted statement he'd made to officers in which he admitted being present.

[17] See also Hudson v. Com., 385 S.W.3d 411 (Ky. 2012).

Wilson's conviction was also upheld.

Stansbury v. Com., 454 S.W.3d 293 (Ky. 2015)

FACTS: Stansbury began living with Falconer, in Bell County, in July, 2010, along with her multitude of inside and outside pets. On February 3, 2012, he arrived home late and they shared a meal. Falconer went to bed, but Stansbury stayed up. Later that morning, Falconer awoke and found smoke in the house, she found the back door locked and Stansbury gone. She got as many pets out as she could, through a window, and then escaped to call for help from a neighbor. Maricle, of the Middlesboro Fire Department and Officers Barton and Cawood, of the PD, arrived together. They later testified about burn marks they observed and noted the odor of petroleum, the back door locked so that it could not be opened from inside, and the smoke detector being missing. Because of that last fact, Arson Investigator Bunch (KSP) was called in, and he concluded the fire was not electrical. Falconer told MPD that a number of valuable items were missing from the house, and that the smoke detector had been there the night before. She indicated Stansbury might be at Reed's home, and in fact, he was located there. He admitted that he'd left and gave reasons for the missing items (which he had) and said he removed the smoke detector because it wasn't working. It was found in the yard a few days later.

Stansbury was indicted for attempted murder and Arson 1st. He was convicted and appealed.

ISSUE: May "bad acts" evidence be introduced if the other party opens the door to it?

HOLDING: Yes

DISCUSSION: During testimony apparently intended to show that Stansbury cared for Falconer's pets (and thus wouldn't have done anything to harm them,) Falconer testified that he'd physically abused them by beating them with chains. He also allegedly killed one of them. Stansbury argued the information was irrelevant and "improper 'bad character' evidence." Although generally, this evidence can't be introduced, when the party "opens the door" to it, it may be discussed in rebuttal. The Court agreed that once he opened that door, "he cannot complain if the Commonwealth walked through that door and introduced character evidence not to his liking."

Stansbury's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – IMPEACHMENT

White v. Com., 2015 WL 1544230 Ky. 2015

FACTS: White and Charlton allegedly shot Wilson on September 8, 2010. Wilson was killed while standing in the front yard of his home in Louisville, shortly after midnight. Witnesses told of a verbal altercation between the three – Wilson having told a large group of people gathered in front of his house to turn music down. A video of Mayfield's interview with the police indicated that White had told Mayfield that he'd shot Wilson.

White was convicted and appealed.

ISSUE: May a prior statement that is not remembered trigger the use of a recorded statement made earlier, when the witness is present?

HOLDING: Yes

DISCUSSION: Mayfield was called to testify in the trial, but explained that a recent brain injury kept him from remembering anything about the shooting or the events of the day in question. The Court agreed that Mayfield's testimony that he could not remember what he'd said was proper foundation under McAtee v. Com.[18] Generally, the Court agreed, hearsay statements are inadmissible.[19] In this case, however, an exception is provided for "prior inconsistent statements of a witness" – under KRE 801A. In McAtee, the Court looked to Crawford v. Washington, in which it was noted that the "Confrontation Clause does not constrain the use of a prior inconsistent statement when the 'declarant is present at trial to defend or explain it.'"[20] The right to cross-examine is not denied "simply because [a] witness claims memory loss."[21] Since the proper foundation was laid that Mayfield did not remember, that he did not remember any of the statements he made to the officer, his "testimony was unequivocal" that he could not have answered any questions.

The court agreed it was proper to "impeach him with the video of the police interview."

White's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – TRIAL

Banks v. Com., 2015 WL 1544294 (Ky. 2015)

FACTS: Banks was charged in Hart County with a number of sex crimes, including rape, incest and sexual abuse. His victim was his daughter, Sharon, who was under 12 at the time. He denied the crimes. During the trial, he "twice complained of improper communications with [the victim] as violations of the rule on separation of witnesses and improper attempts to influence her testimony." He complained that members of a victim's advocacy group had talked to her as she was waiting to testify. He also complained that the lead investigator, who was in the courtroom during the victim's testimony, "tried to influence" her by "silently nodding to her." During her testimony, the victim "could be seen silently mouthing words, as if in tacit communications with someone in the courtroom." That was apparently triggering the detective's nods. Counsel did complain immediately, but the trial court discounted any concerns and denied the request for a mistrial. He was convicted of most of the crimes and appealed.

ISSUE: Is non-verbal communication with a witness prohibited?

HOLDING: Yes

[18] 413 S.W. 3d 608 (Ky. 2013).
[19] KRE 802.
[20] 541 U.S. 36 (2004).
[21] U.S. v. Owens, 484 U.S. 554 (1988).

DISCUSSION: Banks characterized the victim's contact with the advocacy group members (who were present in visible numbers during the trial) as a violation of the rule on the separation of witnesses.[22] The Court noted that the rule required separation, not sequestration. The rule is not intended to "prevent communication or interaction between witnesses and other persons outside the courtroom."[23] There was no proof that the victim was communicating with other witnesses, or that the advocates were relaying to her what other witnesses had said. As such, they were there simply to offer her support and encouragement and as such, their presence and contact outside the courtroom was not improper.

Which respect to the detective's actions, the trial court directed the prosecutor to have the officer "stop gesturing to the witness." The Court agreed that "this voiceless communication between an officer of the prosecution and the testifying witness was improper." However, it felt that the admonition was proper and that a mistrial was not necessary in this case.

The Court also addressed issues with the treating physician and her testimony, but ultimately affirmed the convictions.

TRIAL PROCEDURE / EVIDENCE – STATEMENTS

Cave v. Com., 2015 WL 1544451 (Ky. 2015)

FACTS: Howard was drawing social security benefits that were deposited directly into her account – and accessed using a debit card. A few days prior to her death, her son, Cave, cancelled that card and got a new one, with a new PIN. On June 6, 2011, he murdered her and hid her body in a trash container. The SSA continued to make deposits to her account, and Cave used the card. Following the murder, he left Kentucky and lived in Florida until December 31, when he returned to Kentucky. On December 28, 2011, Tracy Cave (Howard's daughter and Cave's sister) filed a missing persons report and Det. Boles (Lexington PD) began an investigation. On January 2, 2012, Dave was arrested and charged with shoplifting. Det. Boles learned that Howard's debit card was in Cave's possession and interviewed Cave on February 1. Cave confessed and led police to Howard's body.

Cave was indicted for Murder and Fraudulent Use of a Credit Card, as well as Tampering with Physical Evidence. At trial, he raised a claim of Extreme Emotional Disturbance (EED), presenting evidence of their long-term, ongoing use of illegal drugs, and of Howard's physical and psychological abuse of him, his siblings and their father. He was convicted of Wanton Murder and appealed.

ISSUE: Does behavior made much later factor into an EED defense?

HOLDING: No

DISCUSSION: On February 1, Cave made four different recorded statements. The trial court agreed with the Commonwealth that these did, in fact, constitute four separate statements," rather than being part of a continuous process, as they were made to different people, at different

[22] KRE 615; Ballard v. Com., 743 S.W.2d 21 (Ky. 1988).
[23] Woodard v. Com., 219 S.W. 3d 723 (Ky. 2007).

times and in different places. The Commonwealth sought to introduce three of the four statements, to which Cave objected to the exclusion of the fourth one – arguing that to appreciate his mental state, the jury needed to see that one as well, as part of the "rule of completeness." KRE 106 reads:

> "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." To determine if exclusion of a statement or a portion of a statement is fair, the court must determine if "the meaning of the included portion is altered by the excluded portion."[24]

The Court noted that the "defense of EED goes to the perpetrator's state of mind at the time of the crime." His behavior eight months later was not material to that assessment. The Court agreed it was proper to exclude the statement.

After ruling on a number of other issues, Cave's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – NOTES

Martin v. Com., 2015 WL 1544294 (Ky. 2015)

FACTS: During Martin's trial for multiple counts of rape and related offenses, in which Martin's victim was his stepdaughter, the victim "used prepared notes to aid her memory concerning the multiple instances of sexual abuse" about which she testified. Although the defense counsel received a copy of the notes, they were not part of the record. Martin was convicted and appealed.

ISSUE: May notes be used to refresh memory?

HOLDING: Yes

DISCUSSION: The Court noted that the notes were only pertinent to the sexual abuse charges and further that, "Sally can be seen looking down before answering questions posed by the Commonwealth." The Court agreed that the error, if any, was harmless. Since the conviction was being reversed on other grounds, however, the Court noted that if, during a retrial, she would be using such writing to refresh her memory, KRE 612, To use such documents, "the offering party must show that "the witness once had personal knowledge of the event about which testimony is sought and . . . the witness's memory of that event needs to be revived." In such situations, the document isn't admitted into evidence and the hearsay rule doesn't apply. Under KRE 803(5) however, "the offering party must show the writing was made or adopted by the witness as an accurate reflection of personal knowledge the witness once possessed, and the witness no longer adequately remembers the matter to fully and accurately testify." In that situation, the recorded information "may be read into the record as substantive evidence but may not be introduced as an exhibit unless offered by the adverse party."[25] In this case, it was clear that the notes were simply being used to refresh her memory on details and dates, and a proper foundation was laid by the prosecution as to the need for the notes. The Court did emphasize the need to "ensure that Sally

[24] Schrimsher v. Com., 190 S.W.3d 318 (Ky. 2006) (citations omitted).
[25] Brock v. Com. , 947 S.W.2d 24 (Ky. 1997).

does not read from her notes verbatim at retrial." If that occurs, then KRE 893(5) becomes the controlling evidentiary rule, "and a different, more burdensome, foundation is required for the reading of her notes to become admissible as substantive evidence."

The court reversed the conviction for unrelated reasons.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Turpin v. Com., 2015 WL 394202 (Ky. App. 2015)

FACTS: Turpin and the victim met in May, 2012, on an online dating website. They emailed and then began to see each other, leading up to a date in Henderson County on July 21, 2012. They began to argue and because she was too drunk, his victim called a friend, Brooks, to drive her to Turpin's home to collect belongings. (He had apparently left her at the restaurant.) There, she confronted him and asked for items he'd been carrying for her. He refused and took her car keys. She attacked him, scratching him, and she alleged he threatened her. (He denied it, saying he'd only refused to let her drive drunk.) She then claimed he raped and sodomized her and refused to let her out of his sight. After several hours, she feigned chest pains and he let her leave. She drove to a nearby store and contacted Brooks, he came to meet her. He found her upset and called the police. During an exam, the doctor found a number of injuries that corroborated her allegations. Turpin was convicted of Rape, Sodomy and Kidnapping and appealed.

ISSUE: May a doctor offer an opinion on the cause of an injury?

HOLDING: Yes

DISCUSSION: Among other issues, Turpin objected to the doctor testifying that his findings were consistent with sexual assault. The Court agreed that "it is well-established that one witness's vouching for the credibility of another witness is impermissible."[26] However, he initially objected only by arguing that the statement was hearsay and a "finding toward the facts." The trial court had ruled that it was merely his "opinion as to the medical cause of the victim's injuries," and as such, was admissible. The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – BENCH TRIAL

T.G. v. Com., 2015 WL 300704 (Ky. App. 2015)

FACTS: T.G., a juvenile, was charged with Sodomy 1st and Sexual Abuse against another minor. He appealed, arguing that during his district court adjudication, a police officer was permitted to testify to hearsay about statements made by the victim. He also made statements regarding his opinion as to the credibility of the victim.

ISSUE: Does hearsay during a bench trial require a mistrial?

HOLDING: No

[26] Dickerson v. Com., 174 S.W.3d 451 (Ky. 2005); Clark v. Com., 2008 WL 4692347 (Ky. 2008).

DISCUSSION: Because the hearing in question, the Court noted, the judge also heard from the victim, the victim's mother, and T.G. The Court agreed that the judge was presumed to be able to properly disregard hearsay and that the error, if any, was harmless.

EMPLOYMENT

Cunningham v. City of Lynnview, 2015 WL 1304365 Ky. App. 2015

FACTS: On May 19, 2010, Chief Cunningham (Lynnview PD) was notified by letter that his employment had been terminated the week before. The stated reason was for "unsatisfactory performance of duties and actions that reflected discredit upon the City." He requested a hearing under KRS 95.765, KRS 15.520 and local ordinances. A few weeks later, he received a letter "detailing the allegations against him that formed the basis of his termination" and it further noted that there was no outside complaint upon which the action was based, so KRS 15.520 did not apply. As such, his request for a hearing was denied. Cunningham requested an injunction from the Jefferson Circuit Court, which issued a temporary order. The Court did not order his reinstatement, however, but did order that he was entitled to a hearing under KRS 95.765. He was promptly suspended by the mayor. A few weeks later, a civil service hearing was held and his termination was upheld. He moved for review in the trial court, and in 2011, the trial court upheld the termination, looking specifically at KRS 83A.080 and holding that the chief worked at the will of the mayor. Further, the hearing provided for any rights he might have had under KRS 95. The Court agreed that KRS 15.520 did not apply when another "statutory scheme" applied to the termination process.

Cunningham appealed.

ISSUE: Does the failure to provide a timely hearing require reinstatement and back pay?

HOLDING: Yes

DISCUSSION: Due to other cases pending before the court that might apply (Pearce), the Court held the case in abeyance.[27] Both Pearce (and its companion case, Hill) addressed when KRS 15.520 would apply when an officer is accused of misconduct. In Pearce, the Court agreed that the statute applies both to outside complaints and to those that originate inside the agency. The Court specifically noted that KRS 15.520, since it was "both the more specific and [the] later–enacted statute, its provisions supersede and supplant any conflicting provisions … contained in these widely dispersed statutes."[28]

The Court noted that even though Cunningham had a hearing, "he is not asking for another hearing." Instead, he was asking for what KRS 15.520 requires, reinstatement, full back pay and benefits, absent a hearing without 60 days. As such, the Court reversed and remanded the earlier decision and remanded the case for reconsideration under Pearce.

[27] Pearce v. University of Louisville 448 S.W.3d 746 (Ky. 2014).
[28] Withers v. University of Kentucky, 939 S.W.2d 340 (Ky. 1997).

WORKER'S COMPENSATION

City of Independence v. Dunford, 2015 WL 1303645 (Ky. App. 2015)

FACTS: On February 8, 2010, Dunford, an Independence police officer, slipped and fell in the police station parking lot. He had a history of lower back issues, but this fall, caused issues that "were different and more severe." After medical proof was entered, the ALJ ruled that he had an 8% impairment due to the fall, unrelated to prior issues, and that he did not have a "pre-existing active condition" at the time of the injury. Independence appealed and the Workers' Compensation Board ruled that the ALJ did not make a valid determination on the pre-existing condition and remanded it. (It affirmed that he did in fact sustain a work-related injury as a result of the fall.) After a second go-around, Independence further appealed.

ISSUE: Does a pre-existing condition affect how worker's compensation is allocated?

HOLDING: Yes

DISCUSSION: The Court noted the odd posture of the case, in that Independence was appealing an order that was "ultimately in its favor." However, the Court agreed that it was appropriate to remand the case back to require the ALJ to resolve the issue of the possibility of pre-existing injury and also ruled the Dunford was entitled to future medicals on the current injury so long as the needed. Even if some of his condition was attributable to a pre-existing injury, "he would still be entitled to some future medical benefits." (The reasonableness or necessity for particular medical treatment was, however, subject to further consideration.)

The Board's decision was affirmed.

MISCELLANEOUS – TRIAL COURTS

Com. v. Carman/ Westbay, 455 S.W.3d 916 (Ky. 2015)

FACTS: On July 24, 2013, at about 1 p.m., Louisville Metro officers executed a search warrant on a home, and seized methamphetamine and marijuana, along with related paraphernalia. Three men were arrested, Westbay, Carman and Jecker, and they were charged with trafficking and related offenses. Westbay and Jecker, both convicted felons, were also charged with possession of handguns found at the scene. During booking they were interviewed by pretrial services. Their cases were reviewed to Judge Bowles, who set bonds of $5K each for Westbay and Jecker, and $1K for Carman, with arraignment scheduled for the next morning. Before arraignment, however, Judge Armstrong "apparently phoned the Pretrial Services office and order that Westbay and Carman be released on their own recognizance and their arraignment delayed for four days. None of the counsel of record were involved in the process, however."[29]

At arraignment, the Commonwealth argued that the releases were unauthorized and argued to have the original bonds reinstated. Judge Burke, who was assigned the case, noted that "ex parte modification of bond prior to arraignment was not uncommon" and denied the motion. It was set

[29] Recorded phone conversations suggested that someone "pulled strings" to get the two men, who were brothers, released.

for a hearing, but in the meantime, the judge, upon reflection, determined that the trial court was not the correct venue for the matter, but both were at a loss as to what the correct forum would be. Upon further proceedings, with the judge refusing to change the bond, the Commonwealth brought the matter to the Kentucky Supreme Court by way of a certified question.

ISSUE: Are ex parte communications with judges improper?

HOLDING: Yes

DISCUSSION: The Case moved forward under CR 76.37, which allowed the Commonwealth to certify questions to the Court, although it is expressly prohibited from appealing the acquittal of a criminal defendant. Although the passage of time prevented the Court from officially certifying the law, it found a mechanism under Section 110 of the Kentucky to address the issue. The Court noted that the facts "reflect an ex parte culture among some members of the Jefferson District Court and some members of the bar that appears completely inconsistent with the ethical execution of judicial duties."

In these cases, the "formal record" begins with arraignment or initial appearance. But before that, certain decisions, such as initial bail, will be made – during a period the court called "pre-arraignment." In Jefferson County, the "after hours protocol" set a schedule for "duty judges," and through custom and practice, the setting of pre-arraignment bail and conditions of release have fallen to the judge assigned on a given day. This was intended to avoid "judge-shopping." Once that duty judge sets the bail, "the next judge to take the matter under consideration is the judge to whom the case is ultimately assigned for arraignment and beyond." Although the process recognizes that all of the judges possess coequal authority, once assigned by the duty judge, bail should not be modified before arraignment and official assignment. In the prior, related case of Wilson, where ex parte contact led to the setting aside of an arrest warrant, the Court "soundly condemned the practice with the unequivocal message: 'We forbid it.'"

The Court noted that in the first hours after an arrest, it is unfair to force the jail officials to juggle which order is "last" and Jefferson County's local rules was a reasonable way to impose order. The Court reiterated that "pre-arraignment bail orders, like arrest warrants, are not to be modified ex parte, because, by definition, the initial setting of bail has already occurred."

SIXTH CIRCUIT

FEDERAL LAW - ENTRAPMENT

U.S. v. Booker, 596 Fed.Appx. 390 (6th Cir. 2015)

FACTS: Booker was caught up in a sting operation in which he conspired with a woman (an undercover officer) to commit a robbery and deal in drugs. "Andre" – another undercover officer – became involved and eventually, 10 kilos of fake cocaine were prepared to be transferred. Booker accepted the transfer (removing the drugs from a designated vehicle, as discussed) and was arrested for attempted possession of cocaine with intent to distribute. Booker argued at trial that Harris, who had connected him up with the two officers, had actually planned the robbery/drug trafficking. He was convicted and appealed.

ISSUE: Does entrapment require that the subject be an "unwary innocent?"

HOLDING: Yes

DISCUSSION: Booker argued that he was entrapped. To prove that under federal law, he needed to prove the government induced the crime and that he lacked the predisposition to commit it. "The ultimate question is whether the government implanted a criminal disposition in the mind of an 'unwary innocent,' or instead merely tricked an 'unwary criminal.'" In this case, those involved with him testified that he was "impatient to carry out the robbery and frustrated by delays." As such, there was a "great deal of evidence at trial [that] suggested that Booker was predisposed to possess and sell cocaine." The Court upheld his conviction.

CONSTRUCTIVE POSSESSION

U.S. v. Harris, 2015 WL 480257 (6th Cir. 2015)

FACTS: In February, 2013, at about 4 a.m., Officer Ball and Bender (Detroit PD) "noticed an older Cadillac with expired tags." They made a stop and spoke to Harris, the driver. They learned he owned the vehicle and that both the car's registration and his OL had expired and that the vehicle lacked insurance. Three citations were issued. At the same time, Ball was looking into the vehicle and saw a gun partially hidden under the front driver seat, right behind the driver's feet, and he informed his partner. They already knew Harris did not have a concealed weapon permit. Bender ordered Harris to get out and he clambered over the armrest and came out the passenger side. Harris was arrested.

Ball retrieved the loaded revolver he had spotted and did an inventory search. Under the armrest he found another loaded revolver. No fingerprints were found. Officer Evans, who was on the department's federal task force, "inspected" the vehicle. She round a variety of items. Harris's wife reported they rarely drove it and it was usually sitting in their yard, which seemed to be true. Harris was charged, and ultimately convicted, of possession of the firearm, he appealed.

ISSUE: May possession be constructive rather than actual?

HOLDING: Yes

DISCUSSION: To prove that a felon is in possession under 18 U.S.C. §922(g)(1) requires three elements: (1) the defendant had a prior felony conviction; (2) he knowingly possessed a firearm; and (3) the firearm traveled in or affected interstate commerce."[30] The Court agreed that the "possession element may be satisfied through either actual or constructive possession."[31] Actual possession required "direct physical control over a thing at a given time"[32] while constructively possession requires the individual "knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others."[33] The Court agreed that "the line between the two 'is not analytically crisp.'" Even if he did not have actual control, though, he certainly had constructive – and there was sufficient evidence that he knew that at least one of the guns was there – he was the owner and sole occupant, with one gun next to him and the other under his feet. Although "mere proximity … is not sufficient alone," the "position and visibility of the weapons can be relevant factors." The one on the floorboard would have been difficult for him not to have seen as it was right under his feet. In addition, the Court noted that the manner in which he got out of the vehicle was important – since the driver's side door did not open, it would have more natural to raise the armrest to get out the passenger side, but he did not do so – as lifting it would have revealed the revolver hidden underneath. And of course, he owned it and it had been mostly in his possession for years.

Harris's conviction was affirmed.

SEARCH & SEIZURE – WARRANT

Libretti v. Woodson, 2015 WL 221617 (6th Cir. 2015)

FACTS: In 2010, Agent Woodson, a highly experienced DEA agent, was involved in a methamphetamine trafficking investigation in Wyoming. Libretti became a target when linked with two other who were transporting a large quantity of the drug, from Arizona, Woodson had dealt with Libretti before. Using court-authorized phone intercepts, they determined their plans and stopped the other two men en route. Libretti was implicated and they also learned he was selling "spice." They searched his home and found that substance, as well as concealed currency. He was indicted for conspiracy to traffic in methamphetamine.

However, he moved to Ohio just prior to the indictment. The DEA sought to search that home and safe deposit box, and the search there revealed a number of documents and computer storage devices. For this warrant, they included evidence that he regularly used safe deposit boxes and that he'd accessed his Wyoming box the day his home there was searched. That box was closed. The Ohio evidence was used during his Wyoming trial, but he was acquitted. The Court ordered the property returned, although Libretti argued he did not, in fact, get it all back. He also filed suit in the Sixth Circuit against the agents for searching his Ohio home, under Bivens.[34] Following a lengthy process, the Court dismissed the case, ultimately on qualified immunity. Libretti appealed.

---

[30] U.S. v. Nelson, 725 F.3d 615 (6th Cir. 2013).
[31] U.S. v. Walker, 734 F.3d 451 (6th Cir. 2013).
[32] U.S. v. Hunger, 558 F.3d 495 (6th Cir. 2009).
[33] U.S. v. Walker, 734 F.3d 451 (6th Cir. 2013).
[34] Bivens v. Six Unknown Named Agents of Federal Bureaut of Narcotics, 403 U.S. 388 (1971).

ISSUE: Is it improper to seize an item not on a warrant, but that could be contraband?

HOLDING: No

DISCUSSION: Libretti argued, first, that Woodson improperly seized what he reasonably believed was illegal spice, although in fact, they were legal herbs. No herbs were mentioned in the search warrant at all. The Court noted that one of the underlying charges was possession with intent to distribute a controlled substance, and spice was a Schedule I Controlled Substance (in Ohio, apparently). The fact that methamphetamine was the basis of the indictment, and that in fact, the herbs were legal, was "of no consequence." The Court noted that "it is impossible to distinguish, with the naked eye, between legal herbs and those that have been chemically altered." It was reasonable for him to seize the herbs. It was also lawful to seize the documents , which were specifically authorized by the warrant, even though they were not "obviously evidence of any crime."

The Court also upheld the dismissal of Libretti's claim that apparently not all of his property was returned, since the Court noted there was no evidence that Woodson, the subject of the suit, had control of, or the authority or ability to return, any of the challenged property.

Finally, the Court addressed his assertion that the warrant to search his safe deposit box lacked probable cause. The Court agreed that "evidence of drug trafficking activities uncovered during a previous search of an individual's home can provide probable cause to subsequently search a safe deposit box associated with the homeowner." The Court looked to what was known about Libretti and gave weight to Woodson's long experience with the habits of drug traffickers. The Court found clearly sufficient probable cause to support the warrant for the safe deposit box.

After discussing and dismissing a number of procedural issues, the Court upheld the trial court's provision of summary judgement for Woodson.

U.S. v. Burney, 778 F.3d 536 (6th Cir. 2015)

FACTS: From October, 2011 and July, 2012, a drug task force from Montgomery County, Ohio, were investigating Ross and several others for "operating a drug trafficking and money laundering ring in the Dayton metro area." Several reliable CIs made controlled buys and conducted surveillance of suspected "stash houses." The officers concluded, as well, that Brown-Jennings was involved in the criminal enterprise, laundering drug proceeds and concealing his assets – as she owned a large number of very nice vehicles and several properties, despite having minimal income, suggesting she was a front for Ross. A cell phone implicated in the drug dealing was registered to her as well, and on at least one occasion, Ross drove one of her cars to a deal.

While watching one of the properties suspected to be a stash house, officers noticed Burney's truck parked there several times – and that he'd listed that property as his residence on legal documents. He was on parole for one of a string of prior drug offenses. The officers submitted a lengthy search warrant affidavit for that property and inside, found guns and cocaine.

Burney was indicted on drug and weapons charges, as he was a convicted felon. He appealed.

ISSUE: Does the fact that information is old mean that it is stale?

HOLDING: No

DISCUSSION: Burney argued that the search warrant affidavit was insufficient. In this case, the nexus "was supplied principally by the Litchfield property's persistent connections to Ross and Brown-Jennings," who were strong suspects in drug trafficking. Burney's regular presence at the location, which had no identified tenant, and his use of the address – having apparently moved in just a few weeks before the search warrant was issued – only further supported said warrant. The Court agreed that even though Burney had no direct links to Ross, they didn't search it because it was not Burney's residence or any link to Ross, but only because if its apparent usage. Although they had not "observe Ross in the flesh" for some time before the search, they did see his vehicles and could reasonably conclude he was there.

Burney argued that their information was stale. The Court looked to the "four practical, fact-dependent considerations" detailed in U.S. v. Frechette:

> (1) The character of the crime (chance encounter in the night or regenerating conspiracy?), (2) the criminal (nomadic or entrenched ?), (3) the thing to be seized (perishable and easily transferrable or of enduring utility to its holder?), and (4) the place to be searched (mere criminal forum or secure operational base?)[35]

Using those criteria, the Court agreed that all four factors led to the conclusion that the information was not stale. The evidence indicated the house was a stash location, and unlike drug possession, the items sought were "not readily consumable and is of enduring utility to its holder." By its very nature, a residence, it would be a secure operational base. There was a strong link to the two primary suspects and the property.

The Court upheld Burney's conviction.

U.S. v. Houston, 597 Fed.Appx. 382 (6th Cir. 2015)

FACTS: In a search warrant affidavit, the Court noted that an officer stated that "on May 27, 2012, he was in a residence on a disorder call when a woman ran inside and said that a Vice Lords gang member had pointed a gun at a rival gang member." This was corroborated when learned that officers had been dispatched to that area as a result of shots fired, and the officer received a tip that the Vice Lords were shooting at a rival. That informant told the officer "that he was in the residence that was the target of the search, that there were several Vice Lords gang members and firearms present, and that one of the firearms was used in the shooting incident from the previous day."

During the subsequent search, evidence was found from which Houston's arrest was based. He was charged with being a Felon in Possession. When his motion to suppress was denied, he took a conditional guilty plea and appealed.

[35] 583 F.3d 374 (6th Cir. 2009).

ISSUE: Do errors on an affidavit necessarily mean that it is false?

HOLDING: No

DISCUSSION: Houston argued that the drafting officer "deliberately or recklessly included false information in the affidavit supporting the search warrant." He stated that a date was incorrect on the disorder call and the incident report did not mention the woman. The incident report on the call did not match the information on the dispatch log, that the evidence on the shots fired call also had a different date and no shell casings were found, and that the call from the informant was a day later than was indicated.

The Court agreed that the errors in the affidavit were "immaterial to the probable cause determination" and were not indicative of a deliberate or reckless falsehoods. There was no indication that the informant's call was misrepresented in content or that the woman did not speak correctly.

The Court upheld the denial of the motion to suppress, and the plea.

U.S. v. Powell, 2015 WL 1004671 (6th Cir. 2015)

FACTS: In May, 2011, Special Agent Koss (DEA) obtained a search warrant for a home in Detroit, where Powell resided. As a result of a weapon found, Powell, a convicted felon, was charged. He moved to suppress. The Court found the probable cause issue to support the search to be "very close," but allowed the evidence to be admitted pursuant to the good-faith exception to the Exclusionary Rule. Powell was convicted and appealed.

ISSUE: May minimal nexus suffice for a search warrant?

HOLDING: Yes

DISCUSSION: The Court noted that the "affidavit created a minimally sufficient nexus between the drug and firearm activity and [Powell's residence] for the executing agents to reasonably believe that the residence contained evidence of drug and firearm offenses." Powell was linked to the address because he registered vehicles there and had the electric service in his name. A controlled buy had occurred at the address, and the seller had entered that home and emerged with drugs for the buyer. An informant had indicated that Edwards (another suspect) was storing guns there, and it was recognized that traffickers often have guns.

Powell argued the warrant was stale because it was executed some eight months after "some of the key drug activity detailed" occurred. The Court looked to the staleness factors in U.S. v. Abboud: "(1) whether the crime is transitory or continuing; (2) whether the criminal is nomadic or stationary; (3) whether the thing to be seized is perishable or durable; and (4) whether the place to be searched is a forum of convenience or a secure operations base." In evaluating this situation, the Court agreed that the factors weighed in the prosecution's favor.[36]

[36] See also U.S. v. Pritchett, 40 F.App'x 901 (6th Cir. 2002); U.S. v. Greene, 250 F.3d 471 (6th Cir. 2001).

The Court agreed that the warrant was "not sufficiently stale to vitiate the minimally sufficient nexus between" Powell's home and the drug and firearm activity. Powell's plea was affirmed.

SEARCH & SEIZURE – CONSENT

U.S. v. Masters, 591 Fed.Appx. 452, 6th Cir. 2015

FACTS: On March 3, 2012, Investigator Chunn (Tipton County TN SO) applied for a search warrant for Hebert and her home. In the affidavit, he detailed his reasons for believing she was manufacturing methamphetamine. She fled on foot when they served it, but was arrested at the scene. A number of items related to manufacturing were found. She was charged under federal law for offenses relating to manufacturing and moved to suppress. When that was denied, she took a conditional guilty plea and appealed.

ISSUE: Is a residence a secure operational base for staleness assessments?

HOLDING: Yes

DISCUSSION: Masters argued that the affidavit "lacked probable cause, was otherwise stale, and the good-faith exception did not apply." The Court looked at the facts laid out in the affidavit. For example, the Court noted that Chunn had detained how many grams of pseudoephedrine she'd bought over a course of a year, from two different counties, but acknowledged the amount was actually well within what the law permitted during that time. However, the Court agreed that information on their prior criminal history was appropriately considered. With respect to staleness, the Court noted that he did provide a temporal reference for his information, a period of a year.

The Court agreed that her arrest record, the fact that the residence was a "secure operational base," her suspicious purchasing and the fact that certain components of the lab have "continuing utility," was sufficient to support the probable cause for the warrant.

SEARCH & SEIZURE – CONSENT

Grumbley v. Burt, 591 Fed.Appx. 488 (6th Cir. 2015)

FACTS: Grumbley was charged after his half-sister, Misty, age 13, alleged that Grumbley "had been pressuring her to make a sexually explicit film with one of her male friends, Chad Fuoss ("Chad"), and threatened that he would have Chad charged with statutory rape if Misty refused to have sex with Chad and allow Grumbley to videotape it."[37] She also claimed he'd sexually abused her twice. After telling her parents, he was arrested. At the time, he was living with Robinson and her daughter, Dory, apparently in a platonic relationship. Grumbley had his own bedroom, which was where he kept his computer and associated items. During the arrest, at Robinson's trailer, he was ordered to the ground at gunpoint, and then secured and placed in a living room chair.

Det. May requested consent to search the trailer and received consent from both Grumbley and Robinson. (In the alternative, Grumbley gave consent and Robinson did not "register any protest."

[37] The half-sister's name is presumably a pseudonym.

Robinson later stated "she did not recall the police asking to look around.") Det. May testified that Grumbley had signed a consent form but the form was not produced at trial. Grumbley argued that "he had limited his consent on this form, and that he had granted permission only for the police to take his computer." Both had indicated there were guns in their respective bedrooms.

CDs containing child pornography, computers without hard drives, magazines and undeveloped film – which when developed showed Dory (whose age was never given) nude but for a bra. He was given his Miranda warnings in the patrol car and again at the station, where he also signed a Miranda form, and he gave statements "both in the car and after he had signed the waiver form at the station." He was convicted of multiple offenses and appealed.

ISSUE: Does a suspect's actions show they were not coerced into giving a consent?

HOLDING: Yes

DISCUSSION: Grumbley argued that his consent was involuntary. The trial court had found the "argument to be dubious at best." Although acknowledging that "coercive police conduct or a coercive atmosphere" is a factor in determining if a consent is voluntary, the Court found that the totality of the evidence – including the location of the search, his prior experience and age, the lack of an evidence of drug and alcohol involvement and his apparent belief that he'd successfully gotten rid of any incriminating evidence prior to the search, did not suggest he was "feeling scared, intimidated, or threatened" by the police. He also, it appeared, voluntarily waived other rights. However, the Court noted, his counsel was deficient for not arguing that the entry into the home, without a warrant, was improper, as under Payton, "the Supreme Court made clear that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.:[38] Payton means that "absent exigent circumstances," the threshold of the home "may not reasonably be crossed without a warrant." It was undisputed that they did not have a warrant, and the only argument put forth was that they had consent to enter. However, the Court noted, they "did not provide a factual basis in the state courts" that was in fact the case. As such, the Court had to "conclude that the officers lacked consent to enter the home." Without that consent, everything located during the subsequent search had to be suppressed, which defeated most of the charges of which he was convicted. The Court acknowledged that testimony by witnesses about child pornography and guns – he was also a convicted felons – "was not somehow sufficient" for a conviction – without the accompanying physical evidence, and as such, his counsel was deficient for failing to raise the issue at the appropriate time.

The Court reversed the denial of Grumbley's petition for ineffective assistance of counsel and allowed him to proceed on his claims.

U.S. v. Gossett, 2015 WL 127796 (6th Cir. 2015)

FACTS: On February 26, 2011, four Memphis police officers went to Nelson's home, to investigate a complaint that drugs were being sold outside. There, they found two men, Gossett (Nelson's son) and Pinson, both "smoking marijuana while seated in the trunk of a car parked outside." They could see marijuana sitting in the open trunk, as well. Both were arrested.

[38] Payton v. New York, 445 U.S. 573 (1980).

Gossett told them he lived at the home with his mother and they asked for consent to search it. He agreed, but stated they had to check with his mother, first. They talked to Nelson who gave oral, and then written, consent to search. Inside his bedroom, they found a loaded revolver on the dresser as well as more marijuana. When they came out with it, he exclaimed that they'd found his weapon. (His mother later signed a rights waiver stating she knew nothing about the gun.)

Because he was a felon, he was charged with possession of the gun. He moved to suppress the search and the statement. His motion was denied, with the trial court finding her consent was valid and that his statement was a spontaneous utterance. He was convicted and appealed.

ISSUE: May an equal co-tenant give consent for the entire residence?

HOLDING: Yes

DISCUSSION: Gossett argued that although he lived at the residence, with his mother, he had a separate privacy interest in his bedroom. The Court agreed that "it is axiomatic that consent to search must come from someone authorized to give it."[39] In this case, his mother, "as a co-tenant, had common authority over the entire residence."[40] Further, both parties "acted as though she" had the authority to give consent. The officers "acted with the understanding and belief" that his mother could give consent, as she directed them "right on back" to his bedroom. Gossett agreed they "could search any part of the house" if his mother agreed.[41] The Court further noted that his mother gave no indication of any "sort of mental or physical impediment, or influence of medication, that would impair her ability to consent to a search." There was no evidence of coercion, and they even told her that "she had the right to refuse consent." The Court agreed the consent, and the search, was valid.

With respect to the statement, he argued that it was the "fruit of the poisonous tree" or "given in response to interrogation or the functional equivalent of such questioning." Since there was no illegal search, the first argument failed. With respect to his second argument, "statements volunteered by a defendant while in custody are not implicated by" Miranda.[42] Here, he "saw the officers leave his house carrying his gun and simply blurted out that the gun was his." As such, it was spontaneous and properly admitted.

The Court affirmed his denial of the motion to suppress both the search and the statement.

SEARCH & SEIZURE – COLLECTIVE KNOWLEDGE DOCTRINE

Brown v. Lewis / Kamp / Richnak, 779 F.3d 401 (6th Cir. 2015)

FACTS: On April 28, 2011, a call came into a Michigan 911 center from an intoxicated subject, later shown to be Surgeson. His statements included a slang term for a sexually suggestive dance "goin down" but he did not provide further information. He apparently tried to hang up the

[39] U.S. v. Purcell, 526 F.3rd 953 (6th Cir. 2008).
[40] Pratt v. U.S., 214 F. App'x 532 (6th Cir. 2007); U.S. v. Clutter, 914 F.2d 775 (6th Cir. 1990).
[41] U.S. v. Hall, 979 F.2d 77 (6th Cir. 1992); Illinois v. Rodriguez, 497 U.S. 177 (1990).
[42] See U.S. v. Murphy, 107 F.3d 1199 (6th Cir. 1997).

phone but was unsuccessful, so the operator was able to hear him later saying that the police "were about to enter the house," and his announcement that he was going to hide upstairs and for others in the house not to answer the door. Voices in the background of the call laughed at him and ridiculed him. He extorted the occupants of the house for a ride and complained that a particular woman, from who he wanted to get the ride, was not there. (Specifically, he threatened to "kill the bitch.") A few minutes later, his sister, Leslie [Brown] arrived and could be heard to state that he was drunk and that she was unhappy that he was using foul language in front of her children.

Although unknown to the officers responding to the initial call, Leslie had been dropped off at the home by Brown. Her children, along with Leslie's, were at the house with Brown. Leslie received a call from her teenage children asking her to return and deal with Surgeson, and she did so. However, she'd received another call to pick up another child at the hospital, so she'd elected to drop off Leslie and head to that location. As she left the house, she spotted what she thought were officers chasing another car, so she pulled into a gas station to get out of the way. In fact, they were seeking her and the officers, in multiple vehicles, pulled in around her. She later alleged an officer pointed an AR-15 at her head and cursed her as she asked what was going on. She alleged she was pulled forcibly from the car by her sweatshirt, as she moved to step out, as commanded, and thrown to the ground some feet away. She was handcuffed and assisted to her feet. Upon questioning, Brown agreed that she'd just dropped Leslie off at the house, and upon demand, called Leslie's cell phone – as the landline there was still off the hook. Learning that Surgeson was not posing a danger to anyone, the handcuffs were removed and she was released.

Brown filed suit under 42 U.S.C. §1983, arguing an unreasonable seizure and excessive force, along with false arrest and assault and battery. Upon later discovery, the officers noted that they initially perceived Brown to be a male, and that they were unclear on whether Brown was the man who was involved in the call, Surgeson. The Court noted, however, disparities in that claim, and considered it to be a matter of material dispute as to what point they realized the female driver could not be the male caller. The officers involved claimed qualified immunity and were denied by the trial court, with that court finding that the "officers had reasonable suspicion to stop Brown but that the manner and duration of the stop went beyond what the circumstances warranted and therefore constituted an unlawful arrest." The officers appealed.

ISSUE: May officers depend upon collective knowledge in making decisions?

HOLDING: Yes

DISCUSSION: First, the Court addressed the reasonableness of the initial stop. The Court noted that "for such a stop to be reasonable, "the degree of intrusion into the suspect's personal security [must be] reasonably related in scope to the situation at hand."[43] The Court looked to the "collective knowledge doctrine" as developed by U.S. v. Hensley.[44] In such situations in which an officer is acting on information provided by another party, such as a fellow officer or dispatcher, the Court has recognized some limitation:

[43] Smoak v. Hall, 460 F.3d 768, 779 (6th Cir. 2006)."

[44] 469 U.S. 221 (1985) Id; see also Whiteley v. Warden, 401 U.S. 560 (1971) (holding unconstitutional a search executed on the basis of a dispatcher's incorrect statement that a warrant had been issued).

> [I]n a case such as this where one officer's claim to qualified immunity from the consequences of a constitutional violation rests on his asserted good faith reliance on the report of other officers, we consider: (1) what information was clear or should have been clear to the individual officer at the time of the incident; and (2) what information that officer was reasonably entitled to rely on in deciding how to act, based on an objective reading of the information.[45]
>
> This protects officers who "through no improper action or inaction on his part, conducts a stop that is unconstitutional due to the error of a generally trustworthy source." In this case, under a strict application, the Court agreed there was no reasonable suspicion to stop Brown, since the dispatcher knew that the caller was still in the house. However, because in this case, the officers are being sued as individuals, the Court noted that "there is no evidence that they knew the intoxicated male was still in the house." It was never specifically communicated to them, nor did the dispatcher tell them of what could be heard through the open phone – that the occupants were laughing at the original caller and were not taking his "threat" seriously. However, there was nothing communicated to them that would suggest that any females at the house were engaging in a crime, and once they realized they were dealing with a female, they lost any reasonable suspicion.

The trial court noted that Brown's car was "swarmed by officers armed to the teeth, with numerous guns pointed directly at her head." When she tried to comply with the order to get out, she was grabbed and thrown to the ground, an officer knelt on her and she was handcuffed at gunpoint. She was cursed continuously throughout the incident.

The Court noted that "when the nature of a seizure exceeds the bounds of a permissible investigative stop, the detention may become an arrest that must be supported by probable cause."[46] In Smoak, the Court noted that it must "consider the length of the detention, the manner in which it is conducted, and the degree of force used in determining whether an investigative stop is reasonably related to the basis for the original intrusion." Because there was no probable cause to arrest her, and the actions taken during the stop went beyond the bounds of a Terry stop, the detention had ripened into an unlawful arrest. Even putting aside the "gender issue," the Court noted that the actions during the arrest were "warranted to secure a detainee only where specific facts lead to an inference that the detainee poses a risk of flight or of violence to the officers." In this case, the Court found no reason for such aggressive actions. A "bare inference" or speculation that a "detainee may somehow be violent is not sufficient to justify the use of handcuffs."

In the present case, the officers referenced a wide range of speculative inferences from the information conveyed over police radio. The broad range of possibilities they invoked illustrates the lack of concrete information in the police's possession at the time of the stop—and the limited ground for suspicion that a reasonable officer would have. (In their minds, the unidentified male caller could have been engaged in an ambush of police or a hostage situation or a sexual assault or drug activity.) The only specific piece of information the police had even suggesting that the male caller may have been armed or violent was his overheard comment of "I'm gonna kill that bitch." This stray comment is too thin a reed to support a belief that the caller posed significant danger such that, with several guns pointed at his head, it would still be unsafe to question him before he was

[45] Humphrey v. Mabry, 482 F.3d 840 (6th Cir. 2007);
[46] Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008)."

forced to the ground and handcuffed. When Brown was thrown to the ground and handcuffed, the stop ripened into an arrest without probable cause, and she was seized unlawfully.

The Court further concluded that the precepts of the law had been clearly established some time previously and as such, the seizure was unlawful. Further, the court noted that under Brown's recitation of the facts. "she was entirely compliant throughout the stop, and she had not fled from the police." In fact, the officers acknowledged that she was compliant and admitted pointing guns at her. The court agreed that the "force used here was not reasonable in light of the totality of the circumstances."

The Court upheld the denial of qualified immunity for the officers.

SEARCH & SEIZURE – TERRY

Hardy v. Com., 596 Fed. Appx. 396 (6th Cir. 2015)

FACT: On March 28, 2013, at about 1:30 a.m., the Maple Heights PD got a call about a disturbance. A described female was knocking loudly on the door of a home for some 15-20 minutes. She was not there when they arrived, so they began to look. Less than ten minutes later, Sgt. Mocsiran spotted a woman meeting the description about 2/10ths of a mile away. The woman, Reed, was with Hardy when Mocsiran pulled alongside them. Investigator Halley pulled up seconds later. Both cars were marked, but no emergency equipment was activated.

As the officers were talking to Reed, she identified Hardy as her cousin. They did not question Hardy, but when he went to walk away, he was told to "hold on." Hardy denied knowing Reed. The officer requested ID, which Hardy denied having. He announced "I'm gone" and made as to leave. Halley ordered him back and asked for his name and Social Security number, which Hardy provided. While the officer was trying to verify his ID, "Hardy reached behind his back, and a gun fell to the ground on the grass between the sidewalk and the street." Hardy was arrested. When it was learned that he was convicted felon, he was further charged. Hardy moved to suppress the evidence, arguing the officers lacked reasonable suspicion to hold him.

The trial court found there was reasonable suspicion to hold him, but even without that, the "gun was clearly not the product of any search, no frisk." He was convicted and appealed.

ISSUE: Is it reasonable suspicion to hold someone briefly who is in the company of another suspect?

HOLDING: Yes

DISCUSSION: Hardy did not dispute that the encounter began as a consensual one, but when he was kept from leaving, it became at the least a Terry detention. He noted that the original call only concerned a woman and that he was entitled to leave. Nothing indicated he was "nervous or antsy" at the scene (which was on video).

The Court, however, agreed that the circumstances justified the officers stopping Reed, and since she called him by name and announced they were, in effect, together, it was reasonable to believe he

too was involved. The lateness of the house and the lack of anyone else out in the area added to that. His denial of knowing Reed only increased the suspicion. The Court noted this was "a 'totality' situation." They were initially not interested in Hardy, but Reed identifying him, and his denial, led to a reasonable concern which justified detaining Hardy. The total time expanded, before Hardy dropped the weapon, was less than three minutes.

The Court agreed the restriction of his liberty was "sufficiently limited in scope and duration" and upheld the conviction.

42 U.S.C. §1983 – FALSE ARREST

Lilly v. City of Erlanger, 598 Fed.Appx. 370 (6th Cir. 2015)

FACTS: In July 2010 Lilly (then known as Wood) was employed in Cincinnati and resided in an apartment in Crescent Springs, Kentucky. (She lived there part-time, while retaining a primary residence in Louisville.) Overnight in July 8, however, she stayed with her boyfriend in Henryville, Indiana, and they had sex. She drove to Crescent Springs and laid down for a nap, setting her alarm so she could make her shift at the hospital that evening. Although she took an Ambien, she did not fall asleep and instead, got back up and dressed, then went outside and did some yoga. She later claimed that when she went back inside and took a shower, she was attacked and knocked out. When she awakened, she claimed, she was being raped, and was then knocked out again. She called for emergency assistance at 3:37 p.m., after her attacker left, but she was still tied up to the bed. (Her phone was under the pillow.)

Responding officers found the front door locked and deadbolted and the back door also locked, but Officer Kremer was able to gain access. He allowed other responders inside and found Lilly tied, "very loosely" to the bed frame. Another officer indicated only her left foot was actually restrained by a knotted sheet, her other limbs were just looped with the sheets. The bed was the only piece of furniture and her shower, the towels, including one draped over the edge of the tub, her body and the sheets, were all dry. The only indication of a struggle were a few pulled down shower rings. Det. Klare, who responded, found no indication Lilly had been struck with anything, although she claimed to have been hit multiple times, including with the pitcher from a blender; she had only a single facial bruise. She was taken to the hospital and there was evidence of sex, but she stated that her attacker did not ejaculate inside of her. Det. Klare spoke to her parents about concerns with Lilly's account and at the time, noted that her parents seemed to believe it was possible that she may have fabricated the situation. Twelve days later, when she interviewed Lilly, Lilly "became nervous and abruptly ended the interview" for a specious reason. She contacted the detective two weeks later to follow-up and mentioned at that time that she had changed her name (to Lilly) for anonymity – but in fact, her name change had been granted a week before the alleged attack. She never did, however, meet with Klare again, nor did she provide a sample of her boyfriend's semen for comparison, as promised.

Klare began to believe, due to inconsistencies and her own review of the evidence, that Lilly had fabricated the account. Her ex-husband, in an unsolicited phone call, indicated that she was a chronic liar and had previously made false claims. He stated that the day before, she was going to do anything possible to get out of the apartment lease and her job in Cincinnati. Eventually, Det.

Klare took out a warrant against her for falsely reporting an incident, and the rape kit was never analyzed. The prosecutor eventually dismissed the charges, however, without prejudice.

Lilly filed suit under 42 U.S.C. §1983, but eventually, only Dets. Gilpin and Klare remained in the case. The trial court found qualified immunity for the detectives, finding that they had reason to believe there was probable cause for the arrest. Lilly appealed.

ISSUE: Is probable cause the defense to a false arrest claim?

HOLDING: Yes

DISCUSSION: The Court looked to the charge, KRS 519.040(1)(b), and noted that the relevant question is whether the two officers had probable cause to believe that the alleged rape did not occur. The Court noted that "despite a natural caution to refrain from blaming (and incriminating) a person alleging a sexual assault," it agreed that it was not unreasonable for the officers to reach the conclusion that she had falsified the claim. The observations by the officers provided "substantial evidence of fabrication." The multitude of facts, inconsistencies and lies were certainly sufficiently to provide probable cause that she had falsified the report.

As such, the Court agreed, the detectives were entitled to qualified immunity and a dismissal.

Wesley v. Campbell, 779 F.3d 421 6th Cir. 2015

FACTS: Wesley, a counselor at a Covington elementary school, responded to a disturbance in the school where J.S. was "in the midst of an attempt at self-harm." He brought the boy into his office. While Wesley contacted his mother, J.S. stayed with Fischer and two other students who were already in the office. When Wesley's mother arrived, he dispatched them to a local mental health center and followed them in another vehicle. J.S. had an extensive counseling history with Wesley. Prior to the arrival of J.S.'s mother, Wesley told the boy to tell the hospital staff everything that was bothering him. At the hospital, however, the mother confronted Wesley, angry, in the parking lot and demanded he leave. She reported that J.S. had told her that Wesley had sexually abused him. She repeated those allegations to the hospital and Campbell, a social working for CHFS interviewed J.S., who detailed his allegations.

Campbell contacted Det. Rigney (Covington PD). Notably, the Court mentioned, Rigney became involved in the investigation through her friendship with Campbell, not through the "normal assignment channels" of the PD. Both were presented at a forensic interview of J.S. some six days later, at the Children's Advocacy Center. J.S. described sexual abuse that was much more serious than originally detailed. He claimed the abuse had been ongoing for a year and that Wesley had abused others. Rigney and Campbell investigated, attempting to locate other abuse victims. They did not question other potential witnesses, including the principal or Fischer, whose desk faced Rigney's door. The next day, Campbell, with a team of social workers, interviewed 35 children that they believed could have been involved and the children "uniformly denied any inappropriate or unprofessional behavior." J.S. underwent a medical exam that "came back with no concerns." Although they took no further investigative steps, Wesley was suspended by the school and later fired. Campbell had concluded the allegations were substantiated and sent a letter to the appropriate authorities. If Wesley did not appeal, his name would be on the sex offender registry, and Wesley did, in fact, appeal.

84 days following the initial report, Rigney sought a warrant for Wesley, and he was subsequently arrested. The case fell apart quickly, however, as J.S. (and his mother) refused to cooperate in the case. The grand jury declined to indict at the prosecutor's request and the charges were dismissed. Ultimately, the administrative hearing reversed the finding of abuse.

Wesley filed suit against Rigney, Campbell and others, alleging unlawful arrest and related claims. Ultimately, the claims against Rigney were dismissed, and Wesley appealed.

ISSUE: Must inculpatory and exculpatory evidence be considered when looking at probable cause?

HOLDING: Yes (but see discussion)

DISCUSSION: To show that an arrest was wrongful, Wesley "must plausibly allege that it was unsupported by probable cause," based on the "facts and circumstances" of which the officer was aware at the time. It must take both inculpatory and exculpatory evidence into account. The Court agreed that the child's "uncorroborated allegations were legally insufficient to create probable cause," – although eyewitness allegations are presumptively reliable, they must be "reasonably trustworthy."[47] Looking at all of the evidence, the Court agreed that there should have been doubts about his account. In a line of cases from other circuits, the Court noted that a "young child's uncorroborated hearsay allegations were too unreliable to form the basis for probable cause." His claims were "facially implausible," for example, the position of Wesley's office and his practice of leaving his door open, in line of sight with other adult staff members, when he had a student his in office, made it difficult for him to engage in ongoing sexual abuse. The story changed multiple times over a short span of time, and the child's medical exam showed no evidence of the recent alleged anal sodomy. Further, the child had "violent fantasies" and suicidal tendencies. The inability of the officers to uncover any further evidence in corroboration was also probative.

Specifically, the Court noted, Rigney decided to withhold evidence of J.S.'s unreliability and that was material, because it suggested there was in fact, insufficient probable cause. The Court found the omissions to be deliberate, or at least in reckless disregard of the truth. As such, the Court found that qualified immunity was inappropriate on the false arrest claim.

With respect to a claim of retaliatory arrest, the Court noted that the claim was based on Wesley's argument that the arrest was based on his decision to appeal the CHFS ruling of abuse. Since the trial court had ruled that there was probable cause, it never considered the retaliation aspect. As such, the Court reversed that decision as well and remanded the case back for further proceedings.

42 U.S.C. §1983 - FORCE

Goodwin v. City of Painesville, 781 F.3d 314 6th Cir. 2015

FACTS: In the early morning of July 26, 2010, the Nalls hosted a small party (seven people) in their Painesville apartment. At around 1:30 a.m., two guests were outside arguing with the downstairs neighbor. Officers Soto and Hughes responded to a call of a disturbance. When Mrs.

[47] Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

Nall heard the guests arguing outside, she "asked them to come back in when she saw a police cruiser slowly drive down the street." The officers spoke to the downstairs neighbor, who directed them upstairs to the Nall's apartment. The officer could hear arguing as he approached the rear stairwell and knocked on the back door. Both David and Rebecca Nall answered the door, and Rebecca acknowledged the argument and said they would try to "keep it down." David, however, became agitated and Rebecca also "said she would get him to calm down." Nall was angry and "saying he did not want the police there," Rebecca left the room. The officers retreated to the end of the driveway and heard the noise continue. Neighbors began to come outside. The officers "headed back to the Nalls' apartment to make an arrest or give a citation for the noise." As they approached. Michelle Procaska came down the stairs, complaining that Nall had ripped off her necklace and was threatening to kill everyone in the apartment, and the police. They called for backup and headed up, intending to arrest Nall for disorderly conduct. When Nall answered the door and refused to step outside, he was Tazed. He landed on his back and brought his hands up, and the officers tried to get his hands behind him and told him to stop resisting, but according to his wife, he was convulsing from the Taser which was being continuously applied. At some point Officer Collins arrived to assist. Soto then applied the Taser in drive stun mode and he was handcuffed. The Taser's data file showed the first application, through the prongs, lasted 21 seconds and the drive –stun application lasted five seconds. During that time, Rebecca was "screaming and using profanity." Another neighbor called 911 to report what was happening, saying specifically that Nall couldn't follow the officers' commands because he was being shocked.

The officers moved Nall out of the apartment, while another officer arrested Rebecca for disorderly conduct. As they moved him, Officer Collins heard Nall's breathing change. He was also "drooling or foaming from the mouth, he had urinated on himself, and his eyes were open but he did not appear to be conscious." They called for EMS. He went into full cardiac arrest and was resuscitated, and remained in the hospital for two weeks. He was found to have a BA of 0.287. As a result of the oxygen deprivation, he now suffers from severe and permanent cognitive impairment.

The charges against the Nalls were dismissed by the trial court with the judge concluded the officers did not have exigent circumstances to enter the apartment.

The Nalls filed suit under 42 U.S.C. §1983. The trial court denied qualified immunity to the officers and they appealed.

ISSUE: In a Taser case, should it be assumed that using the Taser prevents an individual from complying with orders?

HOLDING: Yes

DISCUSSION: Although in reality, the officers disputed some of the claims put forth by the Nalls, for purposes of the appeal, they accepted the facts as presented by the Nalls. (To not do so will automatically negate their appeal.) The appeal "concerns four alleged constitutional violations: that Officer Soto used excessive force against David Nall, that Officers Hughes and Collins failed to protect Mr. Nall from Officer Soto's excessive force, that Officers Soto and Hughes improperly entered the Nalls' residence without a warrant, and that Officers Hughes and Tuttle arrested Ms. Nall without probable cause."

Starting with Officer Soto's actions, the Court agreed that under the factors set forth in Graham v. Connor, the severity of Nall's crime weighed in Nall's favor.[48] For the second, the Court noted that Prochaska's statement tended to the officers' favor, but her sworn affidavit was signed the day after a warrant was issued for her arrest on an unrelated charged, that was subsequently dropped. In addition, Officer Soto had indicated he had only intended to arrest Nall for Disorderly Conduct, even after hearing of the "threats" he'd made, which was a minor crime.

Further, "Officer Soto failed to activate his recording device during the incident, in violation of the Painesville Police Department policy of recording citizen encounters. This was not the first time—Officer Soto had already been warned about his failure to use a recording device during an earlier citizen encounter." This indicated a pattern of "avoiding documentation of his actions against his credibility." He'd also been reprimanded previously for taking evidence from storage, as well. However, the Court agreed that the issue of whether he posed an immediate threat to the safety of the officers, or others, was at issue. Finally, the third factor looked at whether he was resisting by refusing to come out of the apartment. The court agreed that "active resistance to an officer's command can legitimize an officer's use of a Taser."[49] However, the Court did not agree his refusal to come out of the apartment "constituted verbal hostility and that his movement from the doorway to the living room constituted a deliberate act of defiance."

With respect to his failure to "present his arms for handcuffing in the midst of being tasered, as the officers instructed, there is ample evidence in the record that he did not have control of his body during the ordeal." The Court noted that it had "held that even previously-resisting suspects have a constitutional right to be free of a gratuitous application of a Taser once they have stopped all resistance.[50]

All of the parties agreed that 21 seconds is "atypically long" for a Taser application. Training materials provided to Officer Soto had warned against long applications, because it could cause normal breathing to be disrupted. Although Soto said he thought the Taser would stop at five seconds, even if he was still depressing the trigger, the materials provided suggested otherwise. He was taught "that common effects of tasering include the subject falling immediately to the ground, involuntary muscle contractions, and the subject freezing in place with his legs locked."

To sum up the Court noted that:

> … the application of the Graham factors to the facts taken in the light most favorable to the Nalls shows: (1) that Mr. Nall's crime was not serious, (2) there was little basis to believe Mr. Nall was a threat to the officers or others, (3) Mr. Nall's initial resistance was at most a passive refusal to comply with a single request to leave his residence, and (4) it was objectively apparent that Mr. Nall's failure to present his hands to be cuffed was due to Taser-induced involuntary convulsions.

With respect to the constitutional question as to whether the right was clearly established, the Court agreed there was no right for an actively resisting subject not to be Tased. However, in this case, the

---

[48] 490 U.S. 386 (1989).

[49] Hagans v. Franklin Cnty. Sheriff's Office, 695 No. 14-3120 Goodwin v. City of Painesville, et al. F.3d 505 (6th Cir. 2012); Eldridge v. City of Warren, 533 F. App'x 529 (6th Cir. 2013).

[50] Landis v. Baker, 297 F. App'x 453 (6th Cir. 2008).

Court noted, he was "merely ask[ed]" to come outside, and refused. The Court agreed that prior case law indicated "that officers cannot use force . . . on a detainee who has been subdued, is not told he is under arrest, or is not resisting arrest."[51] "To arrest a person in his home, police officers need both probable cause and either a warrant or exigent circumstances. A holding that a simple refusal to exit one's own home—and surrender the heightened Fourth Amendment protections it provides—constituted active resistance of an officer's command sufficient to justify a tasering would undermine a central purpose of the Fourth Amendment."

Further, the court agreed, even if the initial application was permitted, a jury could conclude that "the extended tasering of Mr. Nall was gratuitous because it extended far past the point that he had ceased resisting." Although acknowledging that the need for a particular degree of force may not necessarily be easily determined, and in some cases, "this would counsel against holding an officer to a standard where it is necessary to evaluate changes in a suspect's behavior over a period of seconds, but with a Taser seconds count." The officer had been trained on the "potentially grave consequences of prolonged application" – especially in the chest. Further, the Nalls argued that the change in his "physical state was drastic and immediately apparent" to the officers. As such, the Court agreed, Officer Soto was not entitled to qualified immunity.

As for failure to protect claims against Officers Collins and Hughes, the Court agreed that under Durham v. Nu'Man, "officers can be held liable for a Fourth Amendment excessive force violation when they were not the ones who actively struck the plaintiff."[52]

> A police officer may be held liable for failure to intervene during the application of excessive force when: "(1) the officer observed or had reason to know that excessive force would be or was being used; and (2) the officer had both the opportunity and the means to prevent the harm from occurring."[53]

In this situation the Court agreed that the officers were present and involved when Officer Soto applied the Taser, and their testimony indicated that Nall's arms were rigid and that was consistent with the effects of the Taser. Neither attempted to get Soto to release the Taser trigger and prevented the second application. The Court agreed that there was sufficient evidence of Nall's condition and that it was up to the jury to conclude "whether a reasonable officer in Officer Hughes's or Officer Collins's position would have seen that the force being applied to Mr. Nall was excessive and taken action to get Officer Soto to stop applying it." As such, both were not entitled to qualified immunity.

With respect to the entry into the apartment, the Court agreed in U.S. v. Rohrig, that "an ongoing and highly intrusive breach of a neighborhood's peace in the middle of the night" was an exigent circumstance.[54] In Rohrig, the Court developed a three part test:

> First, we must ask whether the Government has demonstrated a need for immediate action that would have been defeated if the . . . police officers had taken the time to secure a warrant. Next, we must identify the governmental interest being served by the officers' entry

[51] Grawey v. Drury, 567 F.3d 302 (6th Cir. 2009).
[52] 97 F.3d 862 (6th Cir. 1996)
[53] Turner v. Scott, 119 F.3d 425 (6th Cir. 1997).
[54] 98 F.3d 1506 (6th Cir. 1996).

> into [the] home, and ask whether that interest is sufficiently important to justify a warrantless entry. Finally, we must weigh this governmental interest against Defendant's interest in maintaining the privacy of his home, and ask whether Defendant's conduct somehow diminished the reasonable expectation of privacy he would normally enjoy.

In this case, however the Court noted that the at the time of their arrival, the noisy guests had gone back inside. As such, they were not "generating the type of ongoing and overbearing public disturbance that would give rise to the necessity for immediate action." When they knocked, "they did not tell David Nall to quiet his home or issue him a citation for a noise violation; they immediately asked him to step out of the apartment, and then entered the apartment t by force." Further, "several minutes of elevated noise" did not so diminish their privacy right that would justify a warrant entry under Rohrig. In addition, although a witness suggested Nall was being violent and threatening, there were several issues that put the credibility of the witness, and the officers, at issue. There were facts in dispute that would support the emergency aid exception, and with that, denial of summary judgement on that claim was proper.

Finally, the Court discussed the validity of Rebecca Nall's arrest. The Court agreed that her screaming at the officers to leave, and her swearing, was not sufficiently reckless and unreasonable given her concern for her husband's physical safety, as to provide probable cause for an arrest.

The Court affirmed the summary judgement on all respects.

Pollard v. City of Columbus, 780 F.3d 395 (6th Cir. 2015)

FACTS: Bynum became a suspect in rapes near Los Angeles in the summer of 2007, as a result of DNA matches. He had moved to Columbus, Ohio, so CPD was asked to assist. On July 7, Columbus officers began surveillance on the residence where he was staying, awaiting the arrival of L.A. officers. They spotted Bynum and his brother leave and followed them as they drove around the city. When they returned, the officers were told to arrest Bynum and hold his brother if they left again. Moments later, they both left, in different vehicles and going in different directions. The surveillance team split up and followed. A marked car was summoned to actually make the arrest, and Officer Amstutz responded. He fell in behind Bynum's vehicle with emergency equipment activated. Bynum did not stop, leading Amstutz on a chase. Additional officers joined the pursuit.

The chase ended up on I-70 and eventually, Bynum ended upon in the opposing lane, accelerating until he slammed into a semi head-on. Officers approached the crashed car cautiously, as they had been told the Cadillac's owner (Bynum's brother) had a CCDW. Officers surrounded the vehicle and tried to open the car doors. Officers initially thought Bynum "appeared unconscious" but on dashcam-cam video of the scene, "officers surrounding the Cadillac all take a pronounced step away from the [vehicle] in apparent response to Bynum moving inside." According to the officers, he reached down into the vehicle, toward the floorboard. They ordered him to show his hands but instead, he "extended his arms and clasped his hands into a shooting posture, pointed at the officers." They yelled at him to "don't do it" and to "drop it," but he failed to do so. Officers Yinger and O'Donnell then shot at him. Additional officers "raced in, weapons drawn." Bynum again reached down and then pointed his clasped hands at them. A second volley was fired by Officers Yinger, Estepp, Amstutz, E. Edwards and W. Edwards." In total, 80 shots were fired – Bynum was struck by 23 of them and died. No weapon was found in the Cadillac.

Pollard, Bynum's mother, filed suit under 42 U.S.C. §1983, against the officers and Columbus. The court denied qualified immunity for the wrongful death claim and the officers appealed. Pollard appealed the dismissal of the city as a defendant.

ISSUE: Must the action of multiple officers in a situation be judged individually, rather than collectively?

HOLDING: Yes

DISCUSSION: The Court agreed that the appellate court did have jurisdiction over both appeals. The court noted that "each defendant's liability must be assessed individually based on his own actions."[55] Since the district court failed in that analysis, "observing that the officers' aggregate conduct could be found to violate the Fourth Amendment." In this situation, the Court agreed that each officer did "actively participate[] in the use of force" – each admitted to shooting at Bynum. Each was "operating under the same universe of facts regarding Bynum," "listing to the same police radio and following Bynum as he sped along I-70 and crashed into the semitrailer." Pollard argued that officers could not use deadly force "simply to prevent the escape of a felony suspect."[56]

However, the Court agreed, this claim failed because the officers had explained their concern was not that he might escape, in fact, they knew he could not, but that "they thought he had a gun and considered him a threat." The Court agreed that the "totality of the circumstances clearly gave the offices probable cause to believe that Bynum threatened their safety, he was wanted on "serious rape charges and was potentially armed, and they were told he had a concealed-carry permit." The fact that he was unarmed and did not have a permit was "beside the point," what matters is what they reasonably believed. They also knew that "Bynum was determined to avoid arrest, even at the expense of others' safety and his own life. He essentially tried to commit suicide rather than surrender.[57] They did not shoot him when they believed he was unconscious, but only after he apparently "regained consciousness and made gestures suggesting he had a weapon," and failed to comply with orders.

The Court agreed that the "'tense, uncertain and rapidly evolving' nature of the altercation with Bynum is apparently from the video." If he had a weapon, the officers were at immediate risk, and would have reasonably so perceived. The Court reversed the trial court's denial of qualified immunity in the officers' favor.

Harris v. Lasseigne, 2015 WL 451128 (6th Cir. 2015)

FACTS: On August 27, 2009, Lasseigne (Pontiac, MI, PD) responded to a 911 call about "males in the neighborhoods with guns." Officers Miller (driving) and Lasseigne responded. Officer Werner and Daves were in a second marked vehicle. Lasseigne and Miller spotted Craft walking down the stated street, Ypsilanti. Werner motioned to Craft to come to him, but instead, "Craft turned away and tugged at the waistband of his pants." Lasseigne later reported that Craft "appeared to have a long bulge in his pants." Lasseigne stated that he saw Craft pull out a gun and

[56] Tennessee v. Garner, 471 U.S. 1 (1985).
[57] See Smith v. Freland, 954 F.2d 343 (6th Cir. 1992).

take off running, going between two houses toward a wooded area. Miller also later stated he saw Craft holding a gun. Miller and Lasseigne followed him in the vehicle, with Werner and Daves on foot. Lassiegne was yelling at Craft to drop the weapon. Miller drove between Craft and the wooded area, trapping him between the vehicle and a fence, and he did strike Craft.

Lasseigne later stated that Craft "leveled the weapon, a shotgun" at he and Miller, just a few feet away. He fired one shot and struck Craft in the chest, although he wasn't sure about that at the time. All officers testified that Craft was holding the shotgun at the time, and Werner and Daves testified that they saw him throw it over the fence, where it was subsequently found. Miller and Lasseigne did not, Miller due to an obstructed and view and Lasseigne due to looking away. He was pronounced dead at the scene.

Harris, a neighbor, maintained that he looked out immediately upon hearing the gunshot and that he never saw the shotgun being thrown over the fence. He did observe an officer retrieving it. Harris, Craft's mother, filed suit under 42 U.S.C. §1983 against Lasseigne and a number of other parties. The City and some defendants were dismissed without objection. Summary judgement was given to Miller, as well. Lasseigne's demand for summary judgment, however, was denied, as it found there was a genuine issue of material fact as to whether the shooting was excessive force. Lasseigne appealed.

ISSUE: In a use of force case, must the court look primarily to the plaintiff's version of an event?

HOLDING: Yes

DISCUSSION: Lasseigne argued that the trial court should not have relied on Harris's version of the facts as it was "blatantly contradicted by the record." The argument, however, amounted "to an attempt to demonstrate that his evidence is more plausible" than Harris's. Although there was video, it did not "answer the question of whether he was holding the gun when he was shot," because that occurred out of sight of the camera. To deny him qualified immunity, all the trial court need find is that 'the inferences drawn are reasonable and not blatantly contradicted." If there is the possibility of another side, qualified immunity must be denied and the case left to a jury.

42 U.S.C. §1983 - HECK

<u>Lucier v. City of Ecorse</u> (MI), 2015 WL 542884 (6th Cir. 2015)

FACTS: On July 15, 2010, Lucier had been drinking a "substantial amount of tequila." In the early morning of July 16, Michelle, Lucier's wife woke up to him "pushing a large china cabinet full of dishes and other belongings onto the floor." She called police because she didn't know if he was going to continue, reporting that her husband was "going crazy," "throwing glass and breaking things everywhere." Four officers responded, but by the time they arrived, Lucier had stopped his destructive behavior and was playing drums.

When they entered the basement with Michelle, he had his eyes closed and did not respond to them. According to Michelle, Officer Barkman grabbed one of the cymbals and Lucier stood up, dropped

his drumsticks and then sat back down. Officers started Tasing him and he was handcuffed. At some point, she alleged, they "dropped him back to the ground on his back." She yelled at them to stop because his back had been (apparently previously) broken in two places. Once Lucier was back up, Officer Barkman slapped him with an open hand and he was removed from the basement under arrest. (Lucier himself had no memory of what occurred in the basement and only flashes of what occurred outside.)

Officer Barkman, however, testified that Lucier threw the drumsticks at he and Officer Graham, striking them. He then charged them, whereupon he was Tased. They struggled to handcuff him. As they were going up the steps, he tried to spit in Officer Barkman's face. Once they had him in the car, he allegedly began kicking at them and refused to put his legs inside, he was then drive-stunned. Ultimately he was charged with several offenses and pled guilty to resisting arrest.

Lucier filed suit in state court, and it was removed to federal court under 42 U.S.C. §1983. The officers moved for summary judgement and were, for the most part, denied. The officers appealed.

ISSUE: If succeeding in a lawsuit would imply that a criminal conviction was invalid, must it be disallowed?

HOLDING: Yes

DISCUSSION: First, the officers argued that Heck v. Humphrey bars him from moving forward. Under Heck, if success in a §1983 lawsuit would "necessarily imply the invalidity of his conviction or sentence," the lawsuit must fail. To apply it, the Court "must consider both 'the claims raised under §1983' and 'the specific offenses for which the §1983 claimant was convicted.'" [58]

The officers argued that his excessive force claims were based on a "factual account that necessarily contradicts [his] guilty plea." The Court looked at the city ordinance in question and the officers' argument that Michell's description contradicts the plea. The Court, however, noted that even if they accepted her description, it "does not necessarily contradict [Lucier's] guilty plea or conviction." The Court noted that the "factual basis" for the guilty plea was never specified and as such, it could not be known whether the plea was based on the events in the basement or the events outside. He did not deny that he was "violent and belligerent" outside. As such, his claim was not barred by Heck.

With respect to the facts, the Court acknowledged that while excessive force is not allowed, officers have a "right to use some degree of physical coercion or threat thereof" during an arrest.[59] Using the Graham[60] factors, 1) the severity of the crime at issue, 2) whether the suspect poses an immediate threat to the safety of the officers or others, and 3) whether he is actively resisting arrest or attempting to evade arrest by flight."[61] Looking at his specifically allegations, Lucier argued that the use of the Taser in the basement was improper. The Court looked to Bennett v. Krakowski, noting that "absent some compelling justification – such as the potential escape of a dangerous criminal or the threat of immediate harm – the use of a stun gun on a non-resistant person is

[58] Moe v. Schreiber, 596 F.3d 323 (6th Cir. 2010).
[59] Kostrzewa v. City of Troy, 247 F.3d 633 (6th Cir. 2001).
[60] 490 U.S. 386 (1989).
[61] Burgess v. Fischer, 735 F.3d 462 (6th Cir. 2013).

unreasonable."[62] However, when the subject is "actively resisting arrest," a Taser may be appropriate.[63] In this case, since Michelle's account indicated her husband "made no effort to resist arrest and did not pose any immediate threat to the safety of the officers or to any other individual prior to being tased," there was a genuine issue of act.

Further, with respect to the alleged slap, although little to no physical trauma was alleged, such "gratuitous violence inflicted upon an incapacitated detainee constitutes an excessive use of force."[64] A slap may be a constitutional violation, depending upon the circumstances. As such, the Court affirmed the denial of summary judgement.

42 U.S.C. §1983 – MEDICAL NEED

Scozzari v. City of Clare, 597 Fed.Appx. 845 (6th Cir. 2015)

FACTS: On September 18, 2007, at about 11 p.m., a motel resident called the Clare (MI) PD to report that a "shot had been fired at a park near the motel. Chief Miedzianowski responded and saw a man (Scozzari) "walking from the nearby VFW Hall carrying a flashlight and a cane." The shined his flashlight in the direction of the cruiser. The Chief asked him to stop, to which Scozarri "responded with an expletive and continued walking." The Chief followed him to a motel cabin. Officer McGraw arrived after Scozzari had entered Cabin 17. The two approached and knocked, announcing themselves as police. Scozzari opened the door, holding a knife and a hatchet. McGraw fired his Taser but missed, and Scozarri stepped back inside, closing the door. When the officers kicked the door, he opened it again, still holding the two items. They screamed for him to drop the items, but he did not do so, moving toward McGraw. Both officers fired, for a total of 11 shots.

Chief Miedzianowski reported what had happened and EMS was summoned. They were instructed by the chief to stage at the nearby park, but within minutes, they are summoned to the scene. The paramedic began treatment, stopped briefly while Scozzari was searched and then continued treatment and transport. Scozzari died.

Scozzari's Estate filed suit under 42 U.S.C. §1983, alleging excessive force and denial of timely medical treatment. The case went to trial and the jury returned a verdict in favor of the officers. The Estate moved for a new trial, and the Court agreed, but only on the medical treatment claim, due to an issue with the jury instructions. The officers appeared that decision, arguing that the instruction was sufficient. That was denied and they appealed.

ISSUE: Should medical assistance be summoned (and allowed) promptly when it is obvious that it is needed?

HOLDING: Yes

DISCUSSION: The officers argued there was insufficient evidence to show they were "deliberately indifferent to Scozzari's serious medical need," and that their only obligation was to

[62] 671 F.3d 553 (6th Cir. 2011).
[63] Correa v. Simone, 528 F. App'x 531 (6th Cir. 2013).
[64] Morrison v. Bd. Of Trs. Of Green Twp., 583 F.3d 394

promptly summon medical care, which they did.[65] The Court noted that when such a claim is made, "a constitutional violation arises [only] if the injury in question is 'so obvious that even a layperson would easily recognizing the necessity for a doctor's attention,' and the resulting need for treatment was 'not addressed within a reasonable time frame.'"[66]

The Court acknowledged that the case presented a close call, noting that the officers were involved in activities "unrelated to securing the area in preparation for medical personnel to enter" – even after they were staged. (They were collecting witnesses and searching his room, apparently.) Evidence was presented that staging off-site was standard protocol in such situations, but the Court agreed that reasonable officers should have understood that their responsibility extended to "ensuring that medical responders are able to access the victim without unreasonable delay."

The Court upheld the lower court's decision.

INTERROGATION

U.S. v. Richardson, 597 Fed.Appx. 328 (6th Cir. 2015)

FACTS: In September, 2011, officers executed a search warrant at Richard's Saginaw, MI home. They found a variety of items, including crack cocaine and a loaded gun. During the search, "Richardson became violently ill. He began vomiting and sweating profusely, and he complained of lightheadedness and chest pains." At the hospital, he was immediately admitted and given pain and anti-nausea medication. During that same time, Trooper Sommers gave Richardson his Miranda rights and Richardson nodded his head that he understood. Although Sommers apparently attempted to tape the interrogation, the device turned on and off several times, failing to capture the entire conversation. During that time, Richardson was handcuffed to the bed. His condition improved rapidly at the hospital and "he engaged in a lengthy dialogue with the officers." He admitted to being a drug dealer and confessed to having crack cocaine and the handgun at the house.

Richardson was indicted and his counsel argued for suppression of the hospital statements because "Richardson was questioned while receiving treatment for an acute condition and because the police failed to record most of the interrogation." The trial court denied the motion. Richard went to trial on the issue of whether he was intending to distribute, having stipulated to the drugs and the gun being at his home. At the trial, several officers testified about what was found during the search and "trash pulls" – and how what was found indicated distribution. (The Court also allowed introduction of a prior conviction, 13 years before, for distribution, but the jury was admonished as to how it could use that information.) Richardson was convicted and appealed.

ISSUE: Does hospitalization automatically imply that a person is incompetent to make statements?

HOLDING: No

[65] Revere v. Mass. Gen. Hosp., 463 U.S. 239 (1983); Watkins v. City of Battle Creek, 273 F.3d 682 (6th Cir. 2001); Farmer v. Brennan, 511 U.S. 825 (1970).
[66] Blackmore v. Kalamazoo Cnty, 390 F.3d 890 (6th Cir. 2004).

DISCUSSION: Richardson argued that it was improper not to suppress the statements he'd made while in the hospital. The Court, however, found his "selective recollection" to be not credible, and that since "Richardson's physical maladies had abated by the time he reached the hospital, and that he was capable of understanding the officers as evidenced by the extended dialogue between the parties." The nurse testified that he was not in much distress at the time and that his vital signs were normal. As such, admission of the statement was proper.

The Court agreed, however, that admitting the evidence of the earlier drug conviction was improper, in that the probative value of this evidence on the issue of intent was not substantially outweighed by its prejudicial impact." Generally, "where the crime charged is one requiring specific intent, the prosecutor may use 404(b) evidence to prove that the defendant acted with the specific intent."[67] In the context of drug distribution cases, this Court has stated time and again that prior distribution evidence can be admissible to show intent to distribute.[68] Such evidence is admissible where "the past and present crime are related by being part of the same scheme of drug distribution or by having the same modus operandi."[69] Such a relationship is required because "[t]he only way to reach the conclusion that the person currently has the intent to possess and distribute based solely on evidence of unrelated prior convictions for drug distribution is by employing the very kind of reasoning—i.e., once a drug dealer, always a drug dealer—which 404(b) excludes."[70] The Court noted that "it is incredible to claim that the jury properly considered the evidence "only for his intent" and did not engage in propensity reasoning." That alone entitles Richardson to a new trial.

U.S. v. Wooten, 2015 WL 794278 (6th Cir. 2015)

FACTS: In November, 2010, the FBI focused on a suspect in Indianapolis. That investigation led them to an IP address connected to a residence in Macomb Township, MI. A separate investigation in Connecticut led to the same address. Wooten lived there, along with Teltow and her minor child, and the FBI obtained a search warrant. When the search warrant was executed, Wooten was handcuffed and secured in first a sheriff's vehicle, then an FBI vehicle.
While in the FBI vehicle, he was asked about "his email address, about his relationship with his ex-girlfriend, who was the mother of his child, and about his access to computers in the residence." He identified several photos of a child, in one case, naked in a bathtub, and he identified the child as his daughter. He was taken to the FBI field office and offered refreshment. He was advised of Miranda and questioned. He was again asked about email and access to computers, as well as additional photos he identified of his daughter, many of them nude and focusing on her genitals. He "initialed a confession drafted by one of the agents and signed consent forms allowing the agents to assume his online identity and search his cell phone."

He was indicted on a variety of child pornography charges. He moved to suppress the physical evidence, that was denied. He also moved to suppression his confession, arguing it was coerced. Following a briefing, the court concluded that Wooten had been arrested on an outstanding state warrant before he was moved to the FBI vehicle and that the questioning in that vehicle constituted interrogation. As such, the statements made during that time were suppressed. The court refused to

[67] U.S. v. Johnson, 27 F.3d 1186 (6th Cir. 1994).
[68] See, e.g., U.S. v. Ayoub, 498 F.3d 532 (6th Cir. 2007).
[69] Bell, 516 F.3d at 443.
[70] Id.

deny the statements made at the office, however, finding that he had been given Miranda and waived before that questioning. As such, it did not constitute a Miranda "in the middle."

Wooten was convicted and appealed the admission of his written confession.

ISSUE: Does receiving Miranda warnings later invalidate earlier statements made when Miranda was arguably not required?

HOLDING: No

DISCUSSION: The court looked at the situation under Missouri v. Seibert, as distinguished from Oregon v. Elstad.[71] The Court noted that the awkward way the decision was framed left certain issues in limbo. In this case, the Court ruled that the "prosecution demonstrated by a preponderance of the evidence that the Miranda warnings Wooten received after arriving at FBI headquarters effectively conveyed his rights and rendered his subsequent waiver valid and his confession admissible." The initial questioning simply gave Wooten the chance to confirm what the FBI agents already knew and was certainly not complete or detailed. Although there was some overlapping content between the two, there was also a great deal of additional information provided by Wooten. He provided tremendous detail as to email addresses he had communicated with and photos he had received and shared, and admitting collecting a large number of photos and videos. The "truly inculpatory information that Wooten provide came during the in-house interrogation," the reverse of what occurred in Seibert. The statements were "separated both in time and in setting."

Finally, there was no indication that the process was a "deliberate two-step strategy" or that any coercion was involved in the process. As such, the Miranda warnings were held to be effective and his confession upheld. Wooten's conviction was upheld.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

U.S. v. Roberts, 2015 WL 831908 (6th Cir. 2015)

FACTS: In June, 2011, Turner told Roberts (and four others) that they could ""make 500 [dollars] off of an eight ball[72]" in Johnson City, Tennessee." Turner contacted Jones, his paramour and had her go with them, and rent rooms in her name. On June 22, Jones transported the cocaine. Jones later testified about Roberts' involvement in the process, which involved dividing up the cocaine and selling it. They changed motels but then Jones left, needing to return to Knoxville. On June 24, the motel contacted the Johnson City Police about suspicious activity.

Responding officers detected a strong odor of marijuana and did a knock-and-talk. Turner opened the door and the police saw Roberts run into the bedroom (it was a suite). "Turner attempted to slam the door shut as the officers pushed their way into the room." Investigator Garrison followed Roberts "into the bedroom and placed him in handcuffs while the other officers secured the living room." Sgt. Dougherty frisked Turner and found a small bag of marijuana. They contacted Jones, who rented the room, after getting her phone number from one of the occupants. She didn't admit

[71] 470 U.S. 298 (1985).
[72] 3.5 grams of cocaine.

to being Jones when she answered however, so instead, they obtained consent from Turner. They found over 67 grams of crack cocaine, along with other evidence of trafficking. Learning that Jones had rented a second room, hotel management gave consent to search the empty room, and additional crack cocaine was found.

Roberts (and the others) were indicted on federal charges of intent to distribute. Roberts went to trial and was convicted. He then appealed.

ISSUE: May a consent be given by gesture?

HOLDING: Yes

DISCUSSION: Roberts argued that it was improper to consider what occurred at each of the motels as part of the same process, since the indictment, and Jones' testimony, only discussed the events at the first motel. The Court noted that the indictment alleged that events occurred "on or about" - which would encompass Jones' testimony describing "one continuously flowing enterprise that occurred over the course of two nights." The Court found that appropriate.

Roberts also argued against admitting motel room keys found in his pocket. When he was asked for his ID, he indicated that it was in his back pocket and gestured and told them to retrieve it – as he was handcuffed. With the wallet came two motel key cards, one for each of the rooms they were using. He admitted before being given Miranda that they keys were for the rooms. He argued that the key cards were not "apparently incriminating" and should not have been seized. He also argued that the search exceeded Terry, but the Court agreed that in fact, he consent to the officer retrieving the ID. The Court agreed that "the fact a defendant is handcuffed at the time consent is provided does not automatically negate that consent."[73] The Court agreed a seizure never even occurred as the officer "did not meaningfully interfere with an possessory interest" Roberts had in the cards. Any interference was "temporary and non-invasive." (The cards were either returned to Roberts or turned over to motel management – the parties were not in agreement.)

After addressing other trial related issues, the Court affirmed Roberts' convictions.

TRIAL PROCEDURE / EVIDENCE – CONFRONTATION CLAUSE

Blackston v. Rapelje, 780 F.3d 340 (6th Cir. 2015)

FACTS: On September 12, 1988, Miller, a 22-year-old Michigan resident, disappeared. His case went cold until 1999, when an associate, Lamp, "admitted involvement in the disappearance and eventually led police to the location of Miller's skeletal remains." Lamp claimed that he and Blackston had decided to kill Miller, and did so, with the help of Simpson.

Blackston was charged with Murder. Lamp was allowed to plead guilty to Manslaughter and Simpson given immunity, in exchange for testimony. As there was no physical evidence linking Blackston to the crime, the case "depended entirely" on testimony of the two accomplices and three women who were linked to the men. Lamp and Simpson testified at Blackston's trial, providing details. The defense impeached both on several points, "including charges that they had fabricated

[73] See U.S. v. Burns, 298 F.3d 523 (6th Cir. 2002).

their testimony in exchange for favorable deals." The prosecution used evidence of prior statements consistent with Simpson's trial testimony to try to rehabilitate him. Zantello, Blackston's longtime girlfriend and mother of his two children, also testified that when she left the evening the murder occurred, the three men were together, and when she returned, no one was home. She also testified as to overhearing them talk later about "gory aspects of a killing of some kind." She too was impeached with her "admittedly bad memory," drug and alcohol use and inconsistent prior statements. Mock and Barr, the former being Miller's girlfriend and the latter her sister, also testified that Blackston "made certain incriminating statements" soon after Miller's disappearance. Both were impeached with being intoxicated at the time they heard the statements, and a history of alcohol and drug abuse.

Blackston's defense was to deny participation and offer an alibi, his three sisters. He was, however, convicted. The conviction was reversed when a trial error was discovered. Before the second trial, both Zantello and Simpson gave written recantations, with Zantello saying that an earlier, exculpatory statement was the one that was true. She said she lied in exchange for promises to drop charges pending against her and her then-boyfriend. Simpson claimed he'd perjured himself under threat from Lamp and prosecutorial pressure. At trial, Simpson's "testimony swiftly went awry." Due to his bizarre behavior he was removed from the courtroom, and declared an "unavailable" witness. Instead, the trial court allowed his testimony from the first trial to be introduced, refusing to allow the recantation to be shared. Zantello's testimony also went astray as she either claimed memory loss or invoked her privilege against self-incrimination. Her initial testimony was read to the jury and her recantation held back. Blackston was convicted and appealed. The trial court ruled that he found both witnesses to be manipulating the process to get Blackston acquitted, while at the same time getting the benefit of leniency for themselves. The Michigan Court of Appeals reversed his conviction, but the Michigan Supreme Court reinstated it. Blackston took a federal habeas request. The District Court gave him a conditional writ and this appeal followed.

ISSUE: Is in-person Confrontation required?

HOLDING: Yes

DISCUSION: The prosecution conceded that there is a clearly established right to cross-examine a witness for bias and reliability, as well as the right to "impeach with inconsistent statements." "Mere physical confrontation" is not enough, since the fact finder has to have "an adequate opportunity to assess the credibility of witnesses."[74] The Court noted that "in-person cross examination is obviously possible only where the witness is physically available to testify in the courtroom and then elects to do so." The Court agreed that the recantations were "prototypical impeachment material." Even though there was evidence that the witnesses were attempting to defraud the court, that did not nullify Blackston's "right to confront." As such, not permitting an effective cross-examination, by refusing to admit the recantations to give the "full context and legitimacy of the prior statements." Since the testimony at the first trial was critical to the conviction, so the recantation was critical to the defense. Since the remaining case was weak the error was not harmless.

The Court affirmed the writ of habeas corpus.

[74] Berger v. California, 393 U.S. 314 (1969); Greene v. McElroy, 360 U.S. 474 (1959).

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

U.S. v. Castle, 596 Fed.Appx. 422 (6th Cir. 2015)

FACTS: On April 17, 2012, three Memphis officers stopped a vehicle for unlawful tin. Det. Corder approached Webb, the driver, and Det. Goedecke approached Castle, the passenger. Det. Banning stayed at the rear of the vehicle. Castle was asked to get out and when he did so, he "squatted" in an unusual position. Because his pants were sagging, he was asked to pull up his pants before the detective patted-down his waist. Finding nothing, Castle was told to go back and stand with Banning. As he stepped that way, both detectives "heard a metal-sounding 'thump' on the ground and saw a gun lying in between Castle's feet." He then "looked down at the gun, up at the officers, and took off running." He was quickly apprehended and arrested. The other occupants denied any knowledge of the gun. No fingerprints could be obtained from the gun.

Castle, a convicted felon, was charged with possession. He was convicted and appealed.

ISSUE: Is specialized knowledge (based on specific experience) necessarily lay testimony?

HOLDING: No

DISCUSSION: The Court looked at the facts, as above, and agreed that it was reasonable for the jury to believe he possessed it.

The Court also addressed the testimony of another officer who tried to raise prints from the weapon. He testified that it was "exceptionally rare to recover fingerprints off of firearms," stating that in some 1,500 cases, he'd obtained no more than four. The Court agreed that although it stemmed from his personal knowledge, it wasn't the "sort typically thought of as lay testimony." But, the Court agreed, his testimony likely had little to no effect on the jury's decision.
Castle's conviction was affirmed.

U.S. v. Heflin, 2015 WL 327638 (6th Cir. 2015)

FACTS: On June 9, 2011, in the early morning hours, Heflin was the passenger in a vehicle stopped by police in Toledo. They searched the vehicle and occupants, finding a handgun, cash, heroin and crack cocaine. All were found on Heflin. Heflin was indicted on a variety of drug and weapons charges, as he was a convicted felon. At trial, various witnesses testified as to where the items were found, including witnesses he called in his defense, which placed the contraband in the vehicle and not from him. (That testimony was impeached, however, with her prior testimony that said otherwise.) Heflin denied having any of the items. Specifically, Westover, a friend, testified that "he saw a police officer find the gun under the passenger seat, not on Heflin's person." On cross, Westover equivocated about being involved in drug dealing with Heflin, and in response, prior statements he had made were played for the jury.

Heflin was convicted of the drug charges, but not for the gun. He appealed.

ISSUE: Is background evidence admissible?

HOLDING: Yes (but see discussion)

DISCUSSION: First, Heflin argued that it was improper to allow Westover's statements – that implicated him in prior acts of drug dealing –under FRE 404B. The trial court had ruled the statements were background evidence and inextricably wound into the case at bar and the Court agreed, noting that typically, such "evidence is a prelude to the charged offense, is directly probative of the charged offenses, arises from the same events as the charged offense, forms an integral part of the witness's testimony, or completes the story of the charged offense."[75] In this case, the Court agreed that the testimony indicated the "Heflin possessed drugs and was dealing drugs only a short time before," was in the same vehicle and with at least one of the same people he was with when arrested. His testimony had a "causal, temporal or spatial connection with the charged offense."[76] Further, the Court agreed, impeachment for witness bias was "impliedly authorized." The Court agreed that a limiting instruction should have been given, but did not find that it substantially affected his defense.

Heflin's conviction were affirmed.

STATE EVIDENCE RULES

Olson v. Little, 2015 WL 1004461 (6th Cir. 2015)

FACTS: On June 5, 2002, Snellen was murdered in Georgetown. Olson, her daughter, was charged with conspiracy, under the theory that she solicited her then-boyfriend, Dressman, to commit the crime – which he did with his friend Crabtree. (She had a fractious relationship with her mother, with one source of the friction being Dressman.) One of the key witnesses was Crabtree's cellmate, to whom he'd admitted the murder while he was in custody in an unrelated matter. He solicited the cellmate to kill Dressman because he was concerned that Dressman would reveal his own role in the crime."

Olson was conviction and appealed. When her convictions were affirmed by the Kentucky Supreme Court, she took a federal writ of habeas corpus on several grounds. The writ was denied and she appealed.

ISSUE: Does the KRE require a felony for impeachment?

HOLDING: Yes

DISCUSSION: First, Olson argued it was improper to exclude evidence of Roberts having previously been convicted of a misdemeanor for falsely reporting an incident, which was "probative both as to bias and untruthfulness." It was excluded because it was inadmissible under Kentucky's Rules of Evidence, which allow impeachment with felony convictions, but not misdemeanors. (Impeachment is also allowed with inquiries into "specific instances of conduct – but not criminal convictions.") She argued that it violated her Confrontation Clause rights to "impeach a key witness."

[75] U.S. v. Adams, 722 F.3d 788 (6th Cir. 2013).
[76] Hardy, 228 F.2d ; U.S. v. Marrero, 651 F.3d 453 (6th Cir. 2011).

Since Kentucky did not address the Confrontation Clause issue, the Court had to determine whether it could be raised in the federal appeal. Although the Confrontation Clause is to allow the "exposure of a witness' motivation in testifying," it is not unfettered.[77] In Delaware v. Van Arsdall, however, the Court agreed that "states may 'impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'"[78] Kentucky's rule differs from its sister federal rule, which permits the introduction of evidence of any conviction, if the court agrees that it involves a "dishonest act or false statement."[79] Even Kentucky has acknowledged, in Allen v. Com., that "its rules create an "inability to inquire in any way about misdemeanor convictions reflecting on dishonesty"—what the court called a "substantial hole in the present [evidentiary] regime."[80]

> In its opinion in Allen, the Kentucky Supreme Court discussed two separate aspects of Kentucky Rules of Evidence ("KRE") 608 and 609: whether the rules allow only for inquiring about prior conduct or whether they allow extrinsic evidence to be introduced and also whether Rule 608 permits inquiring about conduct that resulted in a criminal conviction. First, the Court explained that before 2003, Kentucky permitted counsel to attack the credibility of a witness only by introducing evidence about the witness's general reputation for truthfulness or untruthfulness in the community.. In 2003, Kentucky revised its Rule 608 to track the federal version, allowing counsel to inquire about specific acts of bad conduct, other than convictions of crime. The Kentucky Supreme Court explained that KRE 608, however, "does not allow proof of specific instances of conduct by extrinsic evidence."
>
> Rather, the Court explained, "counsel is limited to asking the witness about the specific instance of conduct on cross-examination and is stuck with whatever answer is given." This does not answer, however, what kind of conduct counsel may inquire into. However, a second question is what KRE 609 actually allows with respect to such evidence. The Court noted that Kentucky seems to be the only state that "expressly disallows any identification of the underlying crime" in KRE 609, the impeachment comes solely with identifying that the witness has been convicted of a felony.
>
> Under prior case law, now abrogated by Allen, Kentucky's rules give "rise to "the absurd result that misdemeanor-level dishonest conduct is admissible under KRE 608(b) if a person were simply lucky enough not to have been convicted . . . but that a person who has actually been convicted of a misdemeanor involving a crime of dishonesty could avoid impeachment." Allen recognized that issue, but noted that currently, the rules do "not offer a complete system for addressing dishonest conduct and what it says about a witness's character for truthfulness." Allen thus allowed for KRE 608 to allow "inquiry into all prior bad conduct, even if the conduct resulted in a conviction." As such, under that rule, counsel may inquire about "dishonest conduct that led to the conviction – but not to introduce evidence of the conviction itself."

Olson was, of course, interested in getting Roberts' history before the jury.

---

[77] Douglas v. Alabama, 380 U.S. 415, 418 (1965)).
[78] 475 U.S. 673 (1986).
[79] Compare KRE 609(a) to FRE 609(a).
[80] 395 S.W.3d 451 (Ky. 2013).

With the posture of the case, the Court noted, its "only inquiry is whether the application of those rules violated Olson's constitutional right to confront the witness as already established by the Supreme Court." Nothing in current decisions on the "Confrontation Clause requires that a defendant be permitted to cross-examine using a crimen falsi conviction." Further, the Court noted, given what was introduced about Roberts, it was "unlikely that further impeachment of Roberts would have changed the outcome of Olson's trial." Kentucky had also ruled that although it was error to admit testimony as to Olson's tumultuous relationship with her mother, via a friend, that it was harmless error.

The Court denied her petition for a writ of habeas corpus.

COMPUTER CRIME

U.S. v. Fox, 2015 WL 364012 (6th Cir. 2015)

FACTS: In late 2011, Fox shared hundreds of text messages with S.S., age 15, before finally asking for sex when they actually met face-to-face. They began the exchanges when S.S. sent a message to W.F., Fox's daughter, who had left her cell phone behind at her father's home when she was taken into state custody. He replied to her that W.F. was not available and eventually, their texting moved to his own phone. He took her shopping and bought her a number of clothing items, along with electronics, over the duration of their relationship. Further discussions suggested that he enjoyed her company and wanted to buy her things, but suggested he didn't want her to "get the wrong idea" about him.

In the meantime, the FBI had received a tip that Fox had child pornography. They searched his home and seized his cell phone and computers. He contacted S.S. using his daughter's phone and indicated he needed to talk to her because the FBI would "think there [was] more to" their relationship. A day later he bombarded her with text messages wanting to meet her in person, being mysterious about the "favor" he wanted from her. He picked her up that night and asked for sex, she refused. He took her home. She later sent a text demanding money threatening to tell her brother and the FBI what he'd asked for, which he denied in a responding message. She continued to demand money for family expenses, but he indicated he thought she wanted it for drugs. She never contacted law enforcement, instead only reporting what had happened when the FBI contacted her about the messages.

In September, 2013, another resident of the same town was charged with running a child prostitution ring, S.S. was named as a victim. She allegedly took a large amount of money from the man, and then reported him to a high school counselor. Fox was not made aware of this prior to his trial, however, and he was convicted of "attempted enticement of a minor." He appealed.

ISSUE: May non sexual computer messages be considered "grooming?"

HOLDING: Yes

DISCUSSION: The Court looked at the statute, 18 U.S.C. §2422 (b), with Fox arguing that "their text messages never touched on sexually explicit topics." The Court agreed that such

evidence is not essential to a conviction – instead, he was "flattering her, building intimacy, creating a sense of obligation, and then linking his generosity to his request for sex." Further he used his cell phone in the grooming phase of the relationship, which was enough for the conviction as well, as they were part of the "same course of conduct." As such, the Court found that the charge, and instructions to the jury about it, was proper.

Fox also argued he should have been informed about S.S.'s involvement in the Lilley case, as well. The Court looked to U.S. v. Ogden and agreed that under FRE 412, "a court may not admit evidence of a sex-crime victim's sexual conduct or predisposition unless excluding it would violate the defendant's constitutional right to present a full defense."[81] The Court agreed that any evidence from that case would have simply been cumulative and that she had already admitted that she'd lied to Fox about needing money. As such, in light of all the evidence tending to undermine her credibility, what he would have gotten from that disclosure would have been minimal.

Fox's conviction was affirmed.

MISCELLANEOUS - SENTENCING

U.S. v. Varner, 598 Fed.Appx. 389 (6th Cir. 2015)

FACTS: On March 13, 2013, Varner and Fuller "unsuccessfully attempted to rob a T-Mobile store in Memphis." They went on to successfully rob a second store and then led police on a "multi-state, high-speed car chase." At one point, they tried to strike an officer who was out deploying stop sticks. They were apprehended and charged with a variety of robbery and weapons charges. Varner pled guilty and then was advised of the sentencing guidelines. Specifically, he was facing a six-level sentencing enhancement because his "fleeing car almost hit a law enforcement officer." Only then was he made aware the video documenting the car chase. (The video had not been revealed until Fuller's plea, some three months after Varner's plea.) Varner appealed the sentence.

ISSUE: Must a defendant be aware of all the evidence before they can take a knowing plea?

HOLDING: No

DISCUSSION: Varner argued that since he didn't know about the video, he could not knowingly and intelligently enter into a plea. The Court, however, had given him the possible maximum sentence range and it does not matter if he wasn't aware of the sentencing enhancements.

Varner's sentence was affirmed.

[81] 685 F.3d 600 (6th Cir. 2012).

MISCELLANEOUS - SHERIFF

Laubis v. Witt, 597 Fed.Appx. 827 (6th Cir. 2015)

FACTS: Laubis and Perkins were intimate partners. In February, 2007, Laubis was charged with Assault 4th and he pled guilty to Harassment (physical contact without injury). Perkins was denied a DVO at that time. In June 2010, she requested and this time, obtained, a DVO against Laubis. He surrendered his firearms to Deputy Sheriff Stephens, Fayette County SO. In May, 2012, he learned that three deputies had been charged with taking confiscated guns and selling them. Laubis contacted Sheriff Witt and was told the matter was under investigation. In January, 2014, the DVO was dismissed by agreement of the parties and he obtained an order to recover his firearms. Sheriff Witt, however, refused to turn them over, arguing that the Lautenberg Amendment makes it illegal for an individual convicted of a misdemeanor crime of domestic violence to possess any weapons.

Laubis filed suit against Sheriff Witt. In the litigation, he argued that his conviction for harassment did not qualify under the federal law.[82] The trial court granted Witt's motion to dismiss, finding that he hadn't yet exhausted state remedies to enforce the state court order. Witt was also protected by sovereign and qualified immunity. Laubis appealed.

ISSUE: May a sheriff refuse to return guns if the individual was prohibited from having them?

HOLDING: Yes

DISCUSSION: The Court agreed that her refusal to return the weapons was not a violation of Laubis's Second Amendment rights if the Sheriff was justified under 922(g)(9). The Court noted that since Castleman was reversed, a conviction for a physical force offense was enough to qualify under the federal prohibition.

The Court ruled, as well, that the Sheriff was not entitled to sovereign immunity, as counties are not entitled to Eleventh Amendment protection, nor are they immunized from liability under §1983. Nevertheless, the failure to identify a custom or policy that was the reason for Sheriff Witt's action, so municipality liability does not apply.

The Court agreed that Laubis failed to allege any constitutional violation and upheld the dismissal.

[82] See U.S. v. Castleman, 695 F.3d 582 (6th Cir. 2012) – which held that such crimes must include an element of "strong and violent force."